Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 744,
Petitioner,

v.

ANHEUSER-BUSCH, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the deferential standard of review applicable to labor arbitration awards permit a reviewing court to vacate an arbitrator's award because the reviewing court disagrees with the arbitrator's interpretation of contract provisions to permit the arbitrator to conclude that the parties' conduct after executing the contract modified the contract?

PARTIES TO THE PROCEEDING

Petitioner is Beer, Soft Drink, Water, Fruit Juice, Carbonic Gas, Liquor Sales Drivers, Helpers, Inside Workers, Bottlers, Warehousemen, School, Sightseeing Charter Bus Drivers, General Promotions Employees and Employees of Affiliated Industries, Maltster Laborers, Syrup, Yeast Food, Vinegar, Brewery, Recycling, and Miscellaneous Workers of Chicago and Vicinity, Illinois, Local Union No. 744, Affiliated with the International Brotherhood of Teamsters (the "Union"), a labor organization.

Respondent Anheuser-Busch, Inc. ("ABI") is a corporation. Petitioner is informed that Anheuser-Busch Companies, Inc., a publicly traded corporation, owns 10% or more of ABI's stock.

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OPINIONS BELOW

The Order of the court of appeals denying the Union's petition for rehearing and petition for rehearing *en banc* (App. p. 1a) is available at 2002 U.S. App. LEXIS 5936 (7th Cir. 2002) (unreported). The opinion of the court of appeals (App. p. 3a) is reported at 280 F.3d 1133 (7th Cir. 2002). The Memorandum and Opinion of the district court denying ABI's motion for summary judgment and granting the Union's motion for summary judgment to enforce the arbitration award (App. p. 37a) is unreported.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on February 15, 2002. The Court of Appeals entered an order denying a timely petition for rehearing and rehearing *en banc* on March 28, 2002 (App. 1a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves a labor arbitration decision, which Respondent-employer ABI sought to vacate and Petitioner-Union sought to enforce. The parties' collective bargaining agreements had for years provided for a two-tiered wage scale for ABI drivers. Despite what the contracts said, the parties uniformly applied the higher of the two wage scales to all drivers for a nine and one-half year period. When the parties entered into their most recent contract, with a term of 1998 through 2003, the two-tiered wage scale provision continued, as well as the parties practice of ignoring that language and paying all drivers the higher of the two wage rates. After a

two month period under the 1998 contract, ABI unilaterally eliminated the uniform application of one wage rate for all employees and applied the contract wage schedule. The Union grieved the change, and the Arbitrator sustained the union's grievance.

The Arbitrator's Decision

The focus of the underlying arbitration case was two provisions of the parties' contract. At issue was the "zipper clause" which provided:

> This Agreement constitutes the full and complete agreement between the parties and supercedes all prior agreements between the parties or their representatives, oral or written, including all practices not specifically preserved by the express provisions of this Agreement. (App. P. 53a)

Also of importance was the clause delineating the Arbitrator's jurisdiction, which stated in pertinent part:

> ... The jurisdiction of the arbitrator shall be only in regard to the particular dispute before him and he shall have no power or authority to add to, subtract from, modify or change in any way the terms of this Agreement ...(App. 50a)

The Arbitrator's findings and conclusions indicate that he addressed and interpreted these contractual provisions. The Arbitrator held:

1. "The zipper clause invalidates prior agreements and prior practices not

incorporated into the written contract." (App. 72a)

2. "[A]s I shall point out, neither the zipper clause nor the parole evidence rule bars post-execution amendment or modification of an agreement." (App. 72a)

3. "Had the practice under review not been carried over into the term of the 1998-2003 Agreement, the zipper clause ... would undoubtedly have invalidated it." (App. 73a)

4. "Although I cannot 'add to, subtract from, modify or change in any way the terms of the Agreement,' I am not precluded from giving effect to a long-standing practice or oral understanding reaffirmed and readopted by the Company following execution of the Agreement." (App. 74a)

Arbitrator Berman held that while the zipper clause barred him from considering any *past* practices in effect prior to the execution of the current contract, he was not similarly barred from considering the conduct of the parties *after* execution of the 1998 contract. Arbitrator Berman set forth his reasoning for interpreting the zipper clause in the manner that he did:

> [O]nce reaffirmed after execution of the 1998-2003 Agreement, the practice was no longer a "prior agreement" or "practice" invalidated by

> either the Zipper Clause or the parole evidence rule. Neither the contract clause nor the evidentiary rule prohibits parties to a collective agreement from amending or adding to the agreement *after* it has been negotiated and executed. (App. p. 73a) (emphasis in original)

The District Court's Decision

The district court enforced the Arbitrator's decision because of the deference it is due, stating:

> In the end, however, I am persuaded that the narrow confines of judicial review – the policy discouraging judicial interference in agreed-upon arbitration proceedings – warrants upholding the arbitrator's award. Arbitrator Berman may have erred in interpreting the zipper clause, and in finding that the parties modified the contract, but these decisions are arguably matters of contractual interpretation. Reasonable minds may differ in their characterization of the arbitrator's decision ... (App. p. 43a)

The Court of Appeals' Opinions

This case generated separate opinions from each judge on the panel. While acknowledging the considerable deference due an arbitrator's decision, Judge Coffey, writing for the court opined that "the arbitrator failed to offer any justification for how his decision was derived from the language of the contract. . ." (App. p. 17a, 280 F.3d at 1140, fn. 4), and that "it is evident that the arbitrator rejected the plain language of the contract, without ever claiming to be

'interpreting' any provision of it...." (App. p. 17a, 280 F.3d at 1140) This is so, Judge Coffey states, because "this contract required no interpretation: the zipper clause was unambiguous; the arbitration clause was unambiguous; and the commission rates clause was unambiguous." *Ibid.* And even though the Arbitrator specifically stated that his decision was based on the parties' post-execution conduct, Judge Coffey disbelieved the Arbitrator's representations and held "it is clear the Arbitrator *did actually rely* (not might have relied) on the employee's past practice." (App. p. 15a, 280 F.3d at 1139)(emphasis in original). In this regard, Judge Coffey pointed to the Arbitrator's statement that he was "giving effect to a long-standing practice or oral understanding reaffirmed and readopted by the Company." *Ibid.* The court's judgment not only vacated the Arbitrator's award, but entered judgment on the merits in favor of ABI.

Concurring in the judgment, Judge Rovner disagreed with Judge Coffey as to the Arbitrator's motivations, stating that "I do not think that the arbitrator was acting in bad faith, or that he purposely set about to dispense his own brand of industrial justice." (App. p. 29a, 280 F.3d at 1146) Judge Rovner concluded that the Arbitrator's "decision purporting to interpret the 1998 agreement relied substantially on the unwritten understandings and lengthy course of conduct that preceded the agreement - and resort to such pre-signing conduct was verboten under the express terms of the contract." *Ibid.* And with respect to the Arbitrator's holding that the post-signing conduct of continuing the two-tiered wage scale modified the contract, Judge Rovner said "that is not a question we are called upon to answer, for that is not what the arbitrator held." (App. p. 19a, 280 F.3d at 1145)

Dissenting Judge Easterbrook viewed Arbitrator Berman's findings, right or wrong, as interpretations of the

parties' contract and post-signing conduct. Judge Easterbrook stated:

> The Arbitrator's decision, my colleagues believe, effectively bound the employer to continue its pre-agreement treatment of two-driver routes, thus offending the integration clause.
>
> Because the post-agreement conduct was a continuation of the pre-agreement conduct, this is a possible understanding of what happened, but it is not an inevitable one. Arbitrator Berman recognized that the zipper "clause invalidates prior agreements and prior practices not incorporated into the written contract" (see page 22 of his opinion). He wrote that Anheuser-Busch modified the deal, to the union's benefit, when it continued paying the higher rates for two months after the new collective bargaining agreement became effective. This may be right or wrong...but it does not transgress the integration clause. It is an effort to interpret the contract by reference to post-signing conduct, and a collective bargaining agreement may be altered by the post-signing acts of the parties sought to be bound. (Citations omitted) Judge Coffey denies the applicability of this principle on the ground that an integration clause (which negates the significance of *pre*-signing words and conduct) makes *post*-signing modification by conduct impossible. This reads into the clause more than it contains.

> But if, as Judge Coffey believes, matters turn on the meaning of the particular text in this zipper clause, that is itself a subject for the arbitrator, and a court's disagreement with an arbitrator's understanding of contractual language does not justify displacement of the arbitrator's decision. (App. pp. 29a-30a, 280 F.3d at 1146-47) (emphasis in original)

The Seventh Circuit's Order denying rehearing and rehearing *en banc* indicates that three judges (Posner, Easterbrook and Wood) voted to grant the petition for rehearing *en banc* and two judges (Flaum and Williams) did not participate in the vote. (App. p. 2a)

REASONS FOR GRANTING THE WRIT

I. The Panel's Decision Conflicts With Decisions Of This Court And Other Circuits

The Seventh Circuit's decision in this case directly conflicts with recent precedent of this Court as well as decisions from other circuits, including the Seventh Circuit. *Major League Baseball Players Association v. Garvey*, 532 U.S. 504 (2001); *Eastern Associated Coal Corp. v. Mineworkers*, 531 U.S. 57 (2000); *Madison Hotel v. Hotel and Rest. Employees, Local 25,* 144 F.3d 855 (D.C. Cir. 1998); *Boston Medical Center v. Service Employees International Union,* 260 F.3d 16 (1st Cir. 2001); *Hygrade Operators, Inc. v. Local 333, United Marine Division,* 945 F.2d 18 (2d Cir. 1991); *Local 863, I.B.T. v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530 (3d Cir. 1985); *Upshur Coals Corp. v. United Mine Workers,* 933 F.2d 225 (4th Cir. 1991); *United Food and Commercial Workers v. National Tea Company*, 899 F.2d 386 (5th Cir. 1990); *General Truck*

Drivers v. Dayton Newspapers, Inc., 190 F.3d 434 (6th Cir. 1999), *cert. den.*, 528 U.S. 1137 (220); *Northern Ind. Publ. Serv. v. United Steelworkers*, 243 F.3d 345 (7th Cir. 2001); *Fairview Southdale Hospital v. Minnesota Nurses Ass'n.*, 943 F.2d 809 (8th Cir. 1991); *Hawaii Teamsters, etc., Local 996 v. United Parcel Service*, 241 F.3d 1177 (9th Cir. 2001); *NCR Corp. v. Int'l. Ass'n. Of Machinists, Lodge No. 70*, 906 F.2d 1499 (10th Cir. 1990). All of these cases hold that so long as the labor arbitrator interpreted the contract in making his or her award, the award must be affirmed even if the arbitrator clearly misinterpreted the contract. In this case, the Seventh Circuit decision vacated the arbitrator's award and entered judgment in favor of ABI on the merits because it disagreed with the arbitrator's interpretation of contract provisions (Judge Coffey), or concluded it was "verboten" to even reference, because of a contract provision, practices and understandings existing prior to the execution of the agreement (Judge Rovner).

II. The Seventh Circuit's Decision Is Wrong

Disagreement with the arbitrator's interpretations of contract provisions and the sufficiency of evidence to support an arbitrator's findings, have been uniformly held, up to now, not to be bases for overturning an arbitration award. The majority decision in this case did not apply these standard of review principles. This decision erodes the limitations upon a court's authority in reviewing an arbitrator's award.

This Court recently reiterated the limited and deferential standard of review accorded to labor arbitration determinations in *Major League Baseball Players Association v. Garvey, supra,* 532 U.S. at 509, holding:

> Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36 (1987). We recently reiterated that if an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.' *Eastern Associated Coal Corp. v. Mineworkers*, 531 U.S. 57, 62 (quoting *Misco, supra*, at 38). It is only when the arbitrator strays from interpretation and application of the agreement and effectively "dispenses his own brand of industrial justice" that his decision may be unenforceable. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's "improvident, even silly factfinding" does not provide a basis for a reviewing court to refuse to enforce the award. *Misco,* 484 U.S. at 39.

It is clear that Judge Coffey disagreed with the arbitrator's interpretation of the zipper clause that it did not prohibit the arbitrator from considering post-execution conduct. Together with the arbitration clause, his interpretation of the contract is, in effect, that post-signing conduct of the parties short of written amendment could never modify otherwise unambiguous provisions of the agreement. But, as dissenting Judge Easterbrook points out (App. p. 30a, 280 F.3d at 1146), that conclusion conflicts with decisions

that a collective bargaining agreement may be modified by post-signing acts of the party sought to be bound, citing *Transportation-Communication Employees v. Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966), and other precedents.

Judge Easterbrook, on the other hand, interprets the zipper clause, as did the arbitrator, to permit post-signing conduct to modify the agreement, stating "nothing in this collective bargaining agreement forbids post-signing changes by the employer that benefit the employee." (App. p. 31a, 280 F.3d at 1147) Judge Rovner's concurring opinion doesn't even reach that question, because she somehow concludes that the arbitrator "never inquired whether the parties' post-signing conduct was sufficient, in and of itself, to trump the plain language of the contract." (App. p. 28a, 280 F.3d at 1145) But that is precisely what the arbitrator concluded.

While all of the members of the panel apparently believe, in a plenary review situation, that ABI's continuation of the single-wage scale for two months post-signing of the agreement is insufficient evidence to modify the agreement, the sufficiency of the evidence in the record to enable the arbitrator to reach that conclusion is beyond a reviewing court's authority to challenge.

Judge Coffey's panel decision simply fails to address the arbitrator's interpretation of the zipper clause that, although it prohibited consideration of any practice the parties employed prior to the execution of the 1998 agreement, it did not limit the arbitrator from considering the parties' conduct after the execution of the contract. The fact that the arbitrator referenced the origins and long-standing single-wage practice was enough for Judges Coffey and Rovner to conclude that the arbitrator ignored the zipper clause. But reference to pre-signing practice does not compel the conclusion that ABI's

post-signing continuation of the practice is insufficient to constitute a modification. As Judge Easterbrook correctly put it: "How *could* an arbitrator sharply differentiate pre- from post-signing conduct. One was a continuation of the other." (App. p. 33a, 280 F.3d at 1148) But this difficulty in recognizing the differentiation is not in and of itself sufficient to annul an award. Regardless of whether the arbitrator utilized faulty interpretative skills in interpreting the zipper clause, or incorrectly reasoned that the continuation of the long-standing prior practice for two months after signing the current agreement was sufficient conduct to modify the contract, judicial review of the matter should have ended and the award should have been enforced. Judge Coffey's disagreement with the arbitrator's interpretation of the zipper clause or the significance of the employer's post-signing conduct is simply not justification to vacate the arbitration award.

Other portions of Judge Coffey's opinion also indicate that his decision goes beyond the scope of judicial authority in reviewing an arbitration award. He states:

> There would be no need to prevent the arbitrator from 'adding to, subtracting from, modifying or changing in any way the terms of the Agreement' unless the parties clearly intended to prevent the arbitrator from relying on what the Dissent calls 'post-signing conduct' when interpreting the agreement. (App. p. 19a, 280 F.2d at 1141).

Clearly, Judge Coffey here is substituting his interpretation of a contract clause limiting an arbitrator's authority for that of the arbitrator. Judge Coffey's opinion here indicates that, in his judgment, post-execution modification by the parties'

conduct is impossible because that is beyond what the contract allows. This, however, is a matter of interpretation of a contract provision that does not, by its terms, preclude an arbitrator from enforcing post-signing amendments by oral modifications or conduct. This passage makes clear that Judge Coffey has assumed the role of the arbitrator interpreting the contract and overstepped the authority of a reviewing jurist. Dissenting Judge Easterbrook stressed this temptation to substitute misinterpretation with non-interpretation:

> Let me harp on a vital point: to the extent that the real dispute is about the meaning and affect of the zipper clause, that is itself a matter of contractual interpretation on which the arbitrators' view is conclusive. (App. p. 34a, 280 F.3d at 1148)

And if any doubt remains that the panel's decision usurps the role of the arbitrator while abandoning the role of the reviewing judge, one only need look to what the panel majority ordered. It not only vacated the arbitrator's award, it entered judgment in favor of ABI. In this regard, the panel clearly went too far. Under this Court's precedent, even if the panel's decision was correct, the appropriate remedy would have been to remand the matter to the arbitrator for further proceedings to clarify whether his decision was based on the post-execution conduct, the past practice, or a combination of both. *Misco, supra,* 484 U.S. at 41-42. This Court reiterated its position on this point in *Garvey*:

> Consistent with this limited role, we said in *Misco* that '[e]ven in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as

> a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result. That step we explained, 'would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for' in their agreement. Instead, the court should 'simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement.'" *Garvey, supra,* 501 U.S. at 510.

The appropriate remedy in this matter should not have been a judgment order in favor of ABI on the merits of the grievance.

"'The federal policy of settling labor disputes by arbitration is undermined if courts have the final say on the merits of the awards. '" *Misco, supra,* 484 U.S. at 36, quoting *Steelworkers v. Enterprise Wheel & Car Corp., supra,* 363 U.S. at 596; 29 U.S.C. § 173(d) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.") This Court should grant this petition to preclude the Seventh Circuit from significantly damaging this important policy by making itself the decisive interpreter of collective bargaining agreements, rather than the arbitrator.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 00-4089

[Filed March 28, 2002]

ANHEUSER-BUSCH, INC., Appellant,	)
v.	)
BEER, SOFT DRINK, WATER, FRUIT JUICE, CARBONIC GAS, LIQUOR SALES DRIVERS, HELPERS, INSIDE WORKERS, BOTTLERS, WAREHOUSEMEN, SCHOOL, SIGHTSEEING, CHARTER BUS DRIVERS, GENERAL PROMOTIONS EMPLOYEES, AND EMPLOYEES OF AFFILIATED INDUSTRIES, MALTSTER, LABORERS, SYRUP, YEAST, FOOD, VINEGAR, BREWERY, RECYCLING, AND MISCELLANEOUS WORKERS OF CHICAGO AND VICINITY, ILLINOIS, LOCAL UNION NO. 744, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Defendant-Appellee.	)

Appeal from the United States District Court
for the Northern District if Illinois, Eastern Division
No. 00 C 1424
James B. Zagel, Judge

JUDGES

Before Hon. JOHN L. COFFEY, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-entitled cause, a vote of the active judges on the court was requested*, and a majority have voted to deny a rehearing *en banc*. All of the judges on the panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and the petition for rehearing *en banc* are hereby DENIED.

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* Hon. Richard A. Posner, Hon. Frank H. Easterbrook, and Hon. Diane P. Wood voted to grant the petition for rehearing *en banc*; Chief Judge Joel M. Flaum and Hon. Ann Claire Williams did not participate in the consideration of the petition for rehearing *en banc*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-4089

[Filed February 15, 2002]

ANHEUSER-BUSCH, INC.,	)
Appellant,	)
	)
v.	)
	)
BEER, SOFT DRINK, WATER, FRUIT JUICE, CARBONIC GAS, LIQUOR SALES DRIVERS, HELPERS, INSIDE WORKERS, BOTTLERS, WAREHOUSEMEN, SCHOOL, SIGHTSEEING, CHARTER BUS DRIVERS, GENERAL PROMOTIONS EMPLOYEES, AND EMPLOYEES OF AFFILIATED INDUSTRIES, MALTSTER, LABORERS, SYRUP, YEAST, FOOD, VINEGAR, BREWERY, RECYCLING, AND MISCELLANEOUS WORKERS OF CHICAGO AND VICINITY, ILLINOIS, LOCAL UNION NO. 744, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	)
Defendant-Appellee.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 00 C 1424
James B. Zagel, Judge

JUDGES

Before COFFEY, EASTERBROOK and ROVNER, Circuit Judges. ROVNER, Circuit Judge, concurring in the judgment. Easterbrook, Circuit Judge, dissenting.

OPINION

COFFEY, *Circuit Judge.*

Plaintiff-Appellant Anheuser-Busch, Inc., appeals the judgment of the district court upholding an arbitrator's decision in favor of Teamsters Local Union # 744 ("the Union"), concerning the commission rate Anheuser-Busch paid its union drivers pursuant to the terms of a collective bargaining agreement executed in 1998. We reverse and remand with instructions to vacate the award and enter judgment in favor of Anheuser-Busch, Inc.

I. FACTUAL BACKGROUND

Anheuser-Busch Brewing Company (the "employer") operates a beer distributorship in Arlington Heights, Illinois, and employs Union drivers-salespeople ("drivers") and assistants to deliver pre-sold products to roughly 1,300 retail accounts in the northern suburbs of Chicago. The drivers are paid on a commission basis, with the commission rate set forth in a 5-year collective bargaining agreement (the

"contract") that took effect February 1, 1998.[1] The contract provides one commission rate for drivers who work alone ("one-person routes") and a lower commission rate for drivers who are assisted by a helper ("two-person routes").

From May 1986 to April 1989, the employer and the Union operated under an earlier collective bargaining agreement, which provided that drivers, whether assisted by a helper or not, received the same commission rate. This commission rate became an issue in negotiations, and after long, reasoned, and thorough negotiating sessions, the parties executed a new contract in 1990 that altered the prior commission arrangement and adopted a new two-tiered commission payment structure as referred to above. The same commission rate payment provision was thereafter incorporated into and made a part of the parties' 1994 and 1998 contracts, again after extensive and reasoned negotiations. During the *term of the 1990 and 1994 contracts,* the employer paid all the drivers at the one-person commission (higher) rate. Anheuser-Busch continued this practice of paying the drivers the increased rate of compensation, in contradiction of the written contract, only during the first two months of the newly negotiated, 60-month 1998 contract. In early April 1998, the company announced that effective April 27, 1998, the drivers would henceforth be reimbursed according to the contract language now in force. According to testimony taken during the arbitration hearings, the decision was motivated by the company's need to create more two-person routes and hire additional helpers in

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[1] In order to compensate drivers equally, the contract also provides that some drivers on low volume routes receive a salary in addition to the commissions earned.

response to an increasing number of customers as well as customer complaints dealing with the timeliness of their deliveries. At this same time, in order to achieve more pay for each driver, the employer reduced the number of routes from ten to nine, eliminating all expenses associated with one route and dispersed the cost savings and workload among the remaining nine drivers. On May 7, 1998, the Union filed a grievance protesting the company's decision to follow the terms of the contract, and the dispute proceeded to arbitration pursuant to the terms of the agreement.

The parties stipulated to the parameters of the issue as being, "Did the company violate the labor agreement by changing its practice to conform to the contract provision relating to two-person route commission rates?" It is interesting to note that the question presented was: "Is the company violating the contract when complying with the written terms of the most recent labor agreement?" The contract contained two clauses that limited the arbitrator's power, the arbitration clause and the "zipper clause," or merger clause. The zipper clause states that: *(1) the written agreement constitutes the full and complete agreement between the parties; and (2) the written agreement supercedes all prior agreements and practices not specifically preserved in the contract. Further, the contract specified that the arbitrator had "no authority to add to, subtract from, modify or change"* the terms of the contract. The zipper clause in its entirety reads:

> This Agreement constitutes the *full and complete agreement between the parties and* *supercedes all prior agreements between the parties or their representatives, oral or*

> *written, including all practices not specifically preserved by the express provisions* of this Agreement. This Agreement is the entire agreement between the parties and is the *result of extensive negotiations in which both parties had the right and the opportunity to submit proposals and to negotiate their proposals* with the other party.

The arbitrator somehow sustained the Union's grievance, and found that the employer's payment of the greater commission rate to all drivers during the brief span of but the first two months (60 days) of the new five-year contract constituted a "practice," in the eyes of the arbitrator, that rose to the level of a "post-execution amendment" of the agreement. This action, according to the arbitrator, allegedly nullified the company's right to invoke the thoroughly negotiated and mutually agreed upon contract provision dealing with the parties' agreement to have the two-tiered commission rate. The arbitrator somehow made this finding in spite of the very specific and limiting language in the zipper clause of the contract, *"This Agreement . . . supercedes all prior agreements between the parties . . . oral or written, including all practices not specifically preserved by the express provisions of this Agreement," as well as the specific arbitration clause forbidding him from modifying the written contract.* The arbitrator recognized that the company's April 27, 1998, decision to pay the two-tier (lower) commission rate to drivers working two-person routes was in full compliance with the terms of the collective bargaining agreement agreed to by the Union and the company in each of the three contracts (1990-2003) referred to herein; that the 1998 contract also contained the zipper clause; and that the

1998 contract was the product of exhaustive negotiations. But instead of adhering to the limitations the contract placed on his authority and to the unambiguous and plain language of the contract as it was written, the arbitrator took an end-run around the clear and unambiguous restrictive terms of the contract. The arbitrator somehow reasoned that because the employer allowed the first two months of the sixty-month contract to elapse before changing its practice to adhere to the written contract's commission rates clause, it thus "deprived the Union of its right to bargain [over commission rates] for almost five years," a result that the arbitrator somehow felt (without any explanation) was a "fundamentally unfair maneuver inconsistent with well-settled principles of collective bargaining."

In a vain attempt to find support for his newly fashioned remedy, the arbitrator reached all the way back and justified his overreaching decision in the partial testimony taken at the arbitration hearing that during a worker's strike in 1989, some thirteen years ago, the distributorship's general manager commented to the drivers that the drivers would "have the same pay" whether they worked alone or with a helper. The arbitrator found that this passing statement somehow and someway became an "oral understanding," which, according to the arbitrator, was "readopted" by the employer during the first two months of the 1998 contract in spite of the fact that each of the three most recent collective bargaining agreements (ratified in 1990, 1994 and 1998) contained the very explicit and properly limited zipper clause stating that the contract contained the parties' entire agreement, as well as the identical language dealing with commission rates. Further, these contracts failed to contain any indication, much less language, that the parties had

reached any type of oral understanding that all drivers would be compensated equally, much less an understanding that was the product of a meeting of the minds reflecting an enforceable agreement supported by offer, acceptance and consideration, which is so vital to any contract.

Thus, the arbitrator cast aside the written and thoroughly negotiated terms of the agreement and returned to the terms of the contract in effect prior to 1990 by ordering the employer to pay the higher commission to drivers regardless of whether they were working on one or two-person routes. This finding by the arbitrator contradicts and ignores the express language throughout the 1998 contract at issue, *including the unambiguous terms contained within the commission rates clause, the arbitration clause, and the zipper clause*. Moreover, the arbitrator's finding re-institutes the commission structure that the drivers agreed in negotiation to give up as a concession in 1990 and reaffirmed in the last two contracts in 1994 and 1998. The arbitrator summarized his conclusion as follows:

> Neither the zipper clause nor the parole evidence rule bars post-execution amendment or modification of an agreement . . . . Although I cannot "add to, subtract from, modify or change in any way the terms of this Agreement," I am not precluded from giving effect to a long-standing practice or oral understanding reaffirmed and readopted by the Company following execution of the agreement.

The employer filed suit in federal court requesting the court to vacate the award, and the Union counter-claimed for enforcement of the arbitrator's decision. The trial court granted summary judgment in favor of the Union, holding that because the arbitrator had "interpreted the parties agreement to include both the written [collective bargaining agreement] and a separate oral agreement," the decision should be affirmed under the high degree of deference given to arbitral orders. Anheuser-Busch appeals.

II. STANDARD OF REVIEW

In *Tootsie Roll Indus., Inc. v. Local Union # 1,* 832 F.2d 81 (7th Cir. 1987), we set forth the applicable standard of review for arbitration awards. Quoting from language that has been approved in Supreme Court decisions that are of no less vitality today, we stated in pertinent part as follows:

> An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. at 83 (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960)).

> The arbitrator's decision should not be upset unless it is arbitrary or capricious or fails to draw its essence from the collective bargaining contract because it exceeds the confines of interpreting and applying the contract . . . . It is only when the arbitrator must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract that the award can be said not to "draw its essence from the collective bargaining agreement."

Id. (quoting *Burkort Randall v. Lodge # 1076, 648 F.2d 462*, 465 (7th Cir. 1981) and *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 184-85 (7th Cir. 1985)).

The Supreme Court recently reiterated that judicial review of an arbitrator's decision is limited, stating that "the fact that a court is convinced [the arbitrator] committed serious error does not suffice to overturn his decision." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 505, 509, 149 L. Ed. 2d 740, 121 S. Ct. 1724 (2001) (quoting *Eastern Assoc. Coal Corp. v. Mine Workers*, 531 U.S. 57, 62, 148 L. Ed. 2d 354, 121 S. Ct. 462 (2000)) (internal quotations omitted). Thus, we wish to make it clear that we are not questioning whether the arbitrator has misinterpreted the agreement. Rather, our concern is limited to whether the arbitrator went beyond, or outside, the bounds of interpreting the contract before him while fashioning his award. The question is not whether the arbitrator misinterpreted the agreement, but only whether the arbitrator's inquiry

disregarded the very language of the agreement itself.[2] *See Chicago Newspaper Publ'rs Ass'n v. Chicago Web Printing Pressmen's Union # 7*, 821 F.2d 390, 395 (7th Cir. 1987); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987).

The dissent claims that we may not reverse the arbitrator's decision, "given the law laid down in *Garvey*." Judge Easterbrook seems to imply that *Garvey* somehow worked a radical revision of arbitration law. But the dissent's characterization of *Garvey* as groundbreaking can best be classified as confusing *because Garvey contained no landmark reformulation* of the standard of review in arbitration cases. In fact, Garvey itself relies on the 42-year-old Enterprise Wheel case, cited throughout the majority opinion, and recognizes that in situations like this, *"when the arbitrator strays from interpretation and application of the agreement and effectively 'dispenses his own brand of industrial justice' . . . his decision may be unenforceable." Garvey,* 532 U.S. at 509 (quoting *Enterprise Wheel,* 363 U.S. at 597). The notion

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[2] The dissent states "for the sake of argument" that the arbitrator "made a whopper of an error, the sort of thing that the Supreme Court called an 'improvident, even silly' conclusion." We are somewhat puzzled by Judge Easterbrook's apparent eagerness to joust over the merits of the arbitrator's decision--something which is beyond the scope of our review. We emphasize that *we neither allege that the arbitrator committed clear error nor reached an untenable conclusion based on poorly supported factual findings.* To the contrary, we are convinced that in his opinion the *arbitrator deliberately disregarded the clear language of the contract--and thus his award failed to construe or apply the contract.*

that a reviewing court does not review the "correctness" of an arbitrator's conclusion certainly is hardly a novel one. *Garvey* merely follows *Enterprise Wheel*--a decision rendered more than forty years ago--and we refuse to accept the dissent's exaggerated implication that it has fundamentally reworked the standard of review in arbitration cases.

We have pointed out that an arbitrator cannot shield himself from judicial correction by merely *"making noises of contract interpretation." Ethyl Corp.*, 768 F.2d at 187. "In other words, the arbitrator cannot dress his policy desires up in contract interpretation clothing." *NIPSCO v. United Steelworkers of Am.*, 243 F.3d 345, 347 (7th Cir. 2001). In these situations, the arbitrator exceeded the scope of his authority, and his award must be reversed. *See Young Radiator Co. v. International Union, UAW*, 734 F.2d 321, 325 (7th Cir. 1984) (an arbitration award will not be enforced when the arbitrator *"failed to confine himself to the terms of the collective bargaining agreement."*).

III. DISCUSSION

Anheuser-Busch claims that the arbitrator *modified* (rather than interpreted) the terms of the contract when he found a way to employ language not found any place in the contract (in fact contrary to the express language of the contract) by relying on what he referred to as a "long standing practice" (the payment of one commission rate for all drivers) in spite of the very language of the zipper clause stating, *"This Agreement constitutes the full and complete agreement between the parties and supercedes all prior agreements between the parties or their representatives, oral or written, including all practices not specifically preserved by the*

express provisions of this Agreement." The company argues that the very language of the contract contained everything the arbitrator needed to render his decision and barred him from considering the parties' practices. Additionally, the company claims that the arbitrator improperly reached outside the contract and relied on the parties' practices in place of the agreement's clear and unambiguous language requiring the payment of disparate commission rates between drivers working alone and those using helpers. *"To place past practice on a par with the parties' written agreement* would create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice." *Chicago Web Printing Pressman's Union # 7 v. Chicago Newspaper Publ'rs Ass'n*, 772 F.2d 384, 387 (7th Cir. 1985). The employer further contends that the arbitrator exceeded the contract's limitation on his power not to "add to, subtract from, modify or change in any way" the terms of the written 1998 contract. We agree with the employer.

In *Tootsie Roll Industries*, 832 F.2d at 84, we noted that, "while [an arbitrator's] reliance on the law of the shop is appropriate to interpret ambiguous contract terms . . . the law of the shop cannot be relied upon to modify clear and unambiguous provisions."[3] *See also International Ass'n of Mach., Lodge # 1000 v. General Elec. Co.*, 865 F.2d 902, 906 (7th Cir. 1989) (the "common law of the shop comes into

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[3] Our cases use the phrase "law of the shop," to refer to "the body of past practices between the parties." *Tootsie Roll*, 832 F.2d at 84.

play" only when an ambiguity in the written collective bargaining agreement requires interpretation); *Ethyl Corp.*, 768 F.2d at 186 ("The arbitrator may not modify the contract unless authorized to do so."); *Judson Rubber Works, Inc. v. Mfg. Prod'n & Serv. Workers Union # 24*, 889 F. Supp. 1057, 1066 (N.D. Ill. 1995) (an award will not be enforced when it "draws it essence solely from the parties' past practice.").

In reaching out for some validity in the arbitrator's decision, Judge Easterbrook suggests that the arbitrator was unable to "sharply differentiate pre- from post-signing conduct" and that "it is not sufficient to annul an award that an arbitrator might have acquiesced in a temptation to enforce pre-contractual conduct in the name of fair play." These assumptions are, at best, most problematical. Judge Easterbrook implies that the arbitrator "might" have relied on clearly forbidden pre-arbitration conduct and thus the award should be preserved at all costs. But despite Judge Easterbrook's creative (and factually unsupported) characterization of the arbitrator's opinion, it is clear the arbitrator *did actually rely* (not might have relied) on the employer's past practices. Indeed, despite the arbitrator's best and vain efforts to disguise the fact that he did rely on past practices, *he actually admitted in his decision that he was going outside the very terms of the written contract by stating that he was "giving effect to a long-standing practice or oral understanding* reaffirmed and readopted by the Company." Second, all parties agreed that the contract was clear and unambiguous, facts entirely ignored by the dissent, as well as written in specific language that defined the limits of the negotiated agreement and the scope of the arbitrator's authority. It required neither interpretation nor interpretative

devices. In fact, *neither the arbitrator nor the parties contend that there is any ambiguity* in the language of the contract establishing commission rates for drivers. Thus, there was no need for the arbitrator, in reaching his desired result, to "interpret" the unambiguous contract by reaching outside the contractual language and creating a scheme to rely on past contradictory practices or customs. As we have explained:

> The existence of . . . "industrial common law" does not necessarily mean, however, that the parties should be bound by their customs to the same extent as by explicitly negotiated provisions in their collective bargaining agreement. Unlike contractual agreements, past practices may not always be the result of joint determination[.] . . . In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things.

Chicago Web Printing Pressman, 772 F.2d at 387.

As stated earlier, the parties to the contract agree, and so do we, that the document at issue in this case is neither ambiguous nor incomplete, and the very language of the contract made clear and specific that the arbitrator was without authority to *"add to, subtract from, modify or change in any way the terms of [the] Agreement."* Nevertheless, the dissent insists without any reference to the record, much less explanation or discussion, that Arbitrator Berman "performed an interpretive task." But the dissent never explains what this task was or what term, in the contract that the parties agreed was unambiguous, required interpretation. Indeed, the dissent

ignores the fact that this contract required no interpretation: the zipper clause was unambiguous; the arbitration clause was unambiguous; and the commission-rates clause was unambiguous. Any interpretation drawing its essence from the written contract necessarily would have recognized that the arbitrator was without the authority to modify or change the contract in any way. By contrast, in this case, the arbitrator issued an award based not on any reading of or language in the contract, but rather on his personal view of how the contract would read if Anheuser-Busch's conduct were somehow codified and inserted into the document itself. Thus, it is evident that the arbitrator rejected the plain language of the contract, without ever claiming to be "interpreting" any provision of it and in doing so *rewrote the contract and inscribed his own language upon the contract; something that he was not authorized to do.*[4] Another sister circuit very

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[4] The dissent suggests that "if the dispute is arbitrable, then the adjudicator acts 'within his authority' even if the decision is bad on the merits" and thus because the dispute was arbitrable, the arbitrator made only an interpretive error. We disagree. The dissent appears to equate *jurisdiction* with *authority,* but an arbitrator can act within the scope of his jurisdiction (reviewing an arbitrable matter) and still exceed the scope of his authority (by ignoring the plain language of the contract that limits his authority). To state otherwise is to ignore much of the caselaw cited throughout this opinion.

In this case, let us make clear that the dissent fails to point out a single clause in this thoroughly negotiated contract that the parties or the arbitrator labeled as ambiguous--because, quite simply, *everyone involved agreed that the contract was unambiguous.* Further, the arbitrator failed to offer any justification for how his decision was derived from the language of the contract,

recently agreed. In *Pennsylvania Power Co. v. IBEW*, 276 F.3d 174 (3d Cir. 2001), *the Third Circuit reversed the award of an arbitrator who ignored a zipper clause like the one in this contract and, by considering the parties' practices and other extrinsic evidence, "exceeded his powers under the Agreement" and "altered the Agreement in direct violation of its provision that he had no power to do so." Id.* at 179. The court held that "the arbitrator's decision conflicts with the express provisions of the Agreement between the Company and the Union" and therefore, *"fails to draw its essence from that Agreement." Id.* at 181.

Carefully written, well-reasoned, and thoroughly negotiated contracts are presumptively complete, and the added presence of a merger clause is further strong evidence "that the parties intended the writing to be the complete and exclusive agreement between them." *Regensburger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201, 1206 (7th Cir. 1998). The dissent states in seeking to avoid the impact of the merger clause and suggests that the arbitrator made an "effort to interpret the contract by reference to post-signing conduct, and a collective bargaining agreement may be altered by the

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as it could not, because the language employed by the arbitrator is contrary to the express terms of the contract. As we explain more fully in the text of the opinion below, the arbitrator's decision is a transparent effort to burden the parties with his own personal, subjective notions of fairness in collective bargaining. The arbitrator exceeded his authority, as we discuss more fully below, not because he made an interpretive error--but instead because he modified the terms of a clear and unambiguous contract that needed no interpretation whatsoever.

post-signing acts of the party sought to be bound." He (dissenting judge) goes on to cite several cases, contending that they support his theory that "a collective bargaining agreement may be altered by the post-signing acts of the party sought to be bound." But it is obvious that these cases are irrelevant; none of the contracts in those cases contain a strong, rock-solid zipper clause as well as an arbitration clause barring the arbitrator from "adding to, subtracting from, modifying or changing in any way the terms of the Agreement." Further, as Judge Rovner explains (contrary to the dissent's notion that the concurring opinion supports the dissent's theory) that whether the arbitrator was justified in concluding that Anheuser-Busch effectively modified the contract "is not a question we are called upon to answer, for that is not what the arbitrator held." There would be no need to prevent the arbitrator from "adding to, subtracting from, modifying or changing in any way the terms of the Agreement" unless the parties clearly intended to prevent the arbitrator from relying on what the dissent calls "post-signing conduct" when interpreting the agreement.

Let us not forget that the parties have stipulated that the contract before us is *an unambiguous, exclusive statement of the parties' rights and obligations*. The conduct of the parties is absolutely irrelevant in situations like this involving a dual zipper clause-arbitration clause, as the Second Circuit noted in *Leed Architectural Prods., Inc. v. United Steelworkers of Am.*, 916 F.2d 63, 67 (2d Cir. 1990). In Leed, the court considered the effect of an arbitral clause, like the one in this case, which "denied the arbitrator the right to 'add to, subtract from, or any way modify' its terms." *Id.* at 66. The court held that "the 'zipper clause' in [the] collective bargaining agreement, which denies the arbitrator the right to

'add to, subtract from or in any way modify' its terms, is a pragmatic restatement of the above holdings. Its purpose is to make the written contract the exclusive statement of the parties' rights and obligations." *Id.* Thus, *Leed* makes clear that the combined effect of the arbitration and zipper clauses was to prohibit the arbitrator from *deviating from the clearly defined and thoroughly negotiated written contract*.

The arbitrator's decision paid only lip service to the limitations on his authority imposed by the *combination* of the language of the arbitration clause and the zipper clause. He saw fit to withdraw the commission provision specifically delineated in the 1990, 1994, and 1998 contracts and proceeded to add to the agreement while ignoring its clear language and intent and substituted his personal views of fairness based on a factor he was forbidden to consider, namely the parties' past practices. The dissent cleverly makes only a brief, passing reference to the arbitration clause, suggesting without explanation, that it is not *"sound to read a no-arbitral-modification clause as if it were a no-arbitral-error clause"* (emphasis added). The dissent's argument is premised upon its assumption (unsupported by any reference to the wording in the arbitrator's decision) that the arbitrator made "an effort to interpret the contract"-- even though the unambiguous and thoroughly negotiated, written contract barred any such interpretation -- when he concluded that Anheuser-Busch had itself modified the deal. But were we to accept the dissent's theory, an arbitrator need only claim that he concluded, as did this arbitrator, the "parties modified the contract" in order to completely eviscerate all judicial review, which is what the arbitrator has attempted to do here. We cannot agree to such a view. Garvey makes clear that arbitrators cannot stray "from interpretation and application

of the agreement." 532 U.S. at 509. As we have pointed out, an arbitrator cannot *"dress his policy desires up in contract interpretation clothing"; a wolf in sheep's clothing is still nothing other than a wolf. NIPSCO,* 243 F.3d at 347 (emphasis added). In this case, the contract was clear and unambiguous and needed no interpretation. Accordingly, we are convinced that the *arbitrator, not the parties, modified the contract and thereby exceeded his authority*.

Arbitrators must not "stray from interpretation and application of the agreement and effectively 'dispense . . . [their] own brand of industrial justice.'" *Garvey,* 532 U.S. at 509 (quoting *Enterprise Wheel*, 363 U.S. at 597). But that is precisely what the arbitrator did when he cast aside the extensively negotiated contract and ignored the clear and specific language of the commission-rates clause, the arbitration clause, and the zipper clause. Indeed, the arbitrator himself admitted when he stated that the employer's decision to adhere to the contract as negotiated and written, rather than its past practice, was a "fundamentally unfair maneuver," making clear that the decision, in spite of the arbitrator's sleight of hand, dispensed the arbitrator's own brand of industrial justice.

We note further that the arbitrator's personal opinion concerning the "fairness" of the employer's actions is lacking of support in the record. He went on to find inequity in the fact that Anheuser-Busch's decision to abide by the contract "deprived the union of its right to bargain" over commission rates during the remaining term of the 1998 contract. But this analysis ignores the obvious fact that between 1990 and 1998, the Union and the employer, after extensive negotiation on each occasion, *agreed to* all the terms of the most recent

contract, including the agreement's specific commission structure and *the zipper clause* not once, but on three different occasions (in 1990, 1994, and 1998). Furthermore, despite the fact that the record reflects that the Union agreed to the inclusion of the language of the two-tiered commission provision in the two previous contracts as well as in the current agreement, nothing contained herein indicates that the Union was surprised in any manner, much less *precluded* from renegotiating the commission rates for drivers during the respective bargaining sessions concerning each of the three contracts. The zipper clause set forth in each of the three contracts, as ratified by the Union on three different occasions, clearly states that the contract *"is the result of extensive negotiations in which both parties had the right and the opportunity to submit proposals and to negotiate their proposals with the other party."* It is also most interesting to note that all of the witnesses called to testify at the arbitration hearing (both Union and employer) agreed that they were fully cognizant of the fact that the two-tiered commission structure and the zipper clause was included in each of the three contracts. The witnesses further testified that following the execution of the first contract in 1990, the employer *made absolutely no "promises" or "oral agreements" to the Union that payment of only the greater commission rate would continue into the future.*

In any event, the word "fairness" is as wide and as deep as the ocean and can have a multitude of meanings depending on an individual arbitrator's personal whims and caprice. Thus, any decision motivated by an arbitrator's view of what is "fair" is prohibited by the rule that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own

brand of industrial justice," and that "courts have no choice but to refuse enforcement of the award" when the award fails to "draw its essence from the collective bargaining agreement." *Enterprise Wheel*, 363 U.S. at 597. The arbitrator's reliance on the supposed "unfairness" of the employer's conduct is also at odds with our prior holding that "the arbitrator cannot dress his policy desires up in contract interpretation clothing." *NIPSCO*, 243 F.3d at 347; *see also Appalachian Reg'l Healthcare, Inc. v. United Steelworkers of Am.*, 245 F.3d 601, 606 (6th Cir. 2001) ("even if we were to credit the arbitrator's construction of the Agreement as against its conflict with express provisions, we would still have to vacate the award as it imports notions not found in the Agreement itself.").

Judge Easterbrook goes on to argue that "many a reference to 'fairness' is just a code word for a genuine interpretive principle," and points to the doctrine of "good faith and fair dealing" in contract law as an example. In an attempt to invent a cover for the arbitrator, the dissent implies that the arbitrator in this case was inartfully attempting to ground his decision using some similar interpretive device. However, the dissent fails to point to even a scintilla of evidence in the record to support its speculation that the arbitrator was relying upon any interpretive principle in fashioning his award. On the other hand, because the arbitrator explicitly stated that his award was designed to stamp out what he saw as "fundamentally unfair maneuvers" that worked to what *he believed was the detriment of the labor union,* we are quite confident that he was simply effectuating his personal bias regarding proper labor-management relations. If the arbitrator's decision is read, and attention paid to the context in which the arbitrator uses the word

"fairness," it is clear that the arbitrator reference to 'fairness' was not mere slippage of tongue, as the dissent argues in an unconvincing attempt to explain away the arbitrator's actions; instead it was a--*clear and unambiguous--statement that unequivocally denounced the employer's actions on the basis that they failed to comport with the arbitrator's subjective notions of fairness in the collective bargaining process. A thorough reading of the record makes clear that the arbitrator did more than errantly invoke contract principles when he branded the employer's actions "unfair."*

The majority opinion makes it perfectly clear that the arbitrator disregarded the plain language of the contract, including, but not limited to, language in the zipper clause, the arbitration clause, and the commission rates clause. Nevertheless, the dissent would uphold the arbitrator based on mere speculation that the arbitrator relied on some unspoken interpretive device when reading the contract. *Were we to accept the dissent's theory, then it would never matter whether the respective parties thoughts and ideas are clearly and unambiguously drafted and documented, nor how thoroughly the parties negotiated, nor how clearly the parties placed a precise issue before the arbitrator: if the arbitrator personally felt offended by one party's conduct, we would still uphold his award and permit him to impose his own brand of industrial justice upon the parties under the guise of "good faith." We cannot and will not accept this view. See Enterprise Wheel*, 363 U.S. at 597.

The arbitrator attempted to cloak his actions with "noises" of contract interpretation, but he improperly used the parties' practices to add to the agreement, and his decision reads as though it was deeply rooted in his own personal idea

of industrial justice, rather than living up to the very specific language of the contract at issue. It is particularly telling that the arbitrator, while on the one hand claiming to consider practices occurring only during the first two months of the 1998 contract, *actually* relied on the fact that the employer's payment of the higher commission rate to all drivers was, to quote the arbitrator's own words, a *"long-standing practice or oral understanding"* to which he was giving effect. Had the arbitrator abided by the terms of the contract and disregarded past practices and "understandings" as he was bound to do by both the zipper clause and our case law, he certainly would have recognized and concluded that he had no authority to consider, much less rely upon, any supposed "long-standing practice."

The arbitrator took it upon himself to right what he perceived to be a wrong in the workplace. In doing so, he improperly injected his personal notions of fairness into his decision and thus manifested "an infidelity to his obligation" to follow the law and the language of the contract and not to "add to . . . modify or change" any portion of the thoroughly negotiated agreement. *See Tootsie Roll*, 832 F.2d at 83-84. Long and thoroughly negotiated written contracts would *cease to have meaning should we approve of the actions of the arbitrator and allow him to completely ignore and disregard and cast aside clear and unambiguous contractual language and traverse beyond the limited scope of his review merely by invoking the magic words "contract interpretation."* We are convinced that the arbitration decision in this case failed to "draw its essence" from the collective bargaining agreement that took effect on February 1, 1998, because the decision exceeded the confines of interpreting and applying the contract.

On a final note, we agree with the dissent that one purpose of arbitration is to provide the parties with swift, inexpensive, and final decisions. But this does not vitiate judicial review of an arbitrator's decision. Arbitrators are not free to dispense their own brand of industrial justice and *"may not ignore the plain language of the contract." Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987) (emphasis added). Thus, while the parties may agree to arbitration, they may also agree, as they did in this contract, to limit the arbitrator's authority and preserve their right to challenge decisions when the arbitrator has reached out and rendered a decision that strays beyond his delegated authority and is barred by the negotiated contract. *See George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 581 (7th Cir. 2001) ("People who want their arbitrators to have fewer powers need only provide this by contract."). In this case, the arbitrator ignored the plain language of three clauses in the contract--the clause concerning commission rates, the zipper clause, and the arbitration clause--all of which limited his authority and were written by the parties to prevent the type of improper award that is the subject of this appeal. *See IBEW v. Thomas & Betts Corp.*, 182 F.3d 469, 472 (6th Cir. 1999) ("When a collective bargaining agreement prohibits the addition of contract terms, the arbitrator may not proceed to do so.").

The arbitrator did not merely misread the contract; he intentionally disregarded and thus violated the clear, specific language of the contract, and created an escape hatch through which he could dispense his own brand of industrial justice. Accordingly, the judgment of the district court is REVERSED. This case is REMANDED with instructions to VACATE the award of the arbitrator and ENTER judgment

in favor of Anheuser-Busch, Inc.

CONCUR

ROVNER, *Circuit Judge,* concurring in the judgment.

The 1998 collective bargaining agreement, as written, gave Anheuser-Busch the authority to pay individuals working on two-person routes a lower commission than workers assigned to one-person routes. The unambiguous terms of that agreement also barred the arbitrator from looking to practices pre-dating the agreement (what Judge Easterbrook refers to as "pre-signing conduct") as a source of new or modified contract terms; Article 20, Section 20 expressly provided that "this Agreement constitutes the full and complete agreement between the parties and supersedes all prior agreements between the parties or their representatives, oral or written, *including all practices not specifically preserved by the express provisions of this Agreement."* (Emphasis mine.) We are agreed, therefore, that any prior oral understandings that Anheuser-Busch may have had with the union, and any previous practice with respect to the commissions paid on two-person routes, cannot be imported into the 1998 agreement.

Whether the arbitrator would have been justified in concluding that Anheuser-Busch's practice, for two months after the 1998 agreement took effect, of paying workers on two-person routes at the higher, one-person rate (what Judge Easterbrook refers to as "post-signing conduct") effectively modified the terms of the 1998 Agreement, is not a question we are called upon to answer, for that is not what the arbitrator held. The arbitrator never inquired whether the

parties' post-signing conduct was sufficient, in and of itself, to trump the plain language of the contract. At all times, he was concerned with whether the parties had signaled an intent to carry forward their pre-signing understandings and practices in the 1998 Agreement. This much is evident from the way in which the arbitrator framed the question before him: "I must decide whether a long-standing past practice supersedes the contract language." Arbitrator's Opinion and Award at 17 (emphasis mine), quoting the Union's Brief at 12. But that question is answered unequivocally by Article 20, Section 20--all prior practices not expressly preserved by the contract are displaced, and the written terms of the contract control.

True enough, the arbitrator did advert to the parties' post-signing conduct. But as the arbitrator's rationale makes plain, he viewed the post-signing conduct as a window onto the parties' past practices, not as an independent revision of the 1998 terms regarding commission rates. What the arbitrator seized upon is the parties' failure, upon execution of the 1998 Agreement, to promptly abandon their pre-signing practice and conform their conduct to the pertinent terms of the new contract--as if long-standing practices were to be read into the contract unless timely discontinued by the parties. *See* Arbitrator's Opinion and Award at 22 ("Had the practice under review not been carried over into the term of the 1998-2003 Agreement, the zipper clause, as well as the parol evidence rule, would undoubtedly have invalidated it."). In the end, it is the parties' pre-signing conduct that the arbitrator read into the contract; their post-signing conduct is cited merely as a convenient bootstrap to reinsert a long-standing, but unwritten, practice into the agreement. *See, e.g.*, Arbitrator's Opinion and Award at 20 ("the Company

did, in fact, carry the practice embodied in Green's [1989] promise into the 1998-2003 contract"). Yet, the unmistakable effect of Article 20, Section 20 is to wipe the slate clean of such previous understandings and practices. And no one is arguing that the parties modified or abandoned *that* provision. Without the pre-signing conduct to rely upon, the arbitrator's construction of the agreement is wholly bereft of support.

I do not think that the arbitrator was acting in bad faith, or that he purposely set about to dispense his own brand of industrial justice. His own perception of the equities do appear to have influenced his construction of the contract, however. *See, e.g.*, Arbitrator's Opinion and Award at 23-24. More importantly, I think it evident that his decision purporting to interpret the 1998 agreement relied substantially on the unwritten understandings and lengthy course of conduct that preceded that agreement--and resort to such pre-signing conduct was verboten under the express terms of the contract. To that extent, I agree that the arbitrator exceeded his authority, and that his award must be vacated.

DISSENT

Easterbrook, *Circuit Judge*, dissenting.

Arbitrator Herbert M. Berman found that Anheuser-Busch and its drivers' union had modified their written collective bargaining agreement by post-signing conduct. The district court enforced that decision. Now this court reverses. My colleagues' separate opinions rely principally on the agreement's integration clause, which forbids any reference to pre-signing conduct and negotiating history. The arbitrator's decision, my colleagues believe, effectively bound

the employer to continue its pre-agreement treatment of two-driver routes, thus offending the integration clause.

Because the post-agreement conduct was a continuation of pre-agreement conduct, this is a possible understanding of what happened, but it is not an inevitable one. Arbitrator Berman recognized that the zipper "clause invalidates prior agreements and prior practices not incorporated into the written contract" (see page 22 of his opinion). He wrote that Anheuser-Busch modified the deal, to the union's benefit, when it continued paying the higher rates for two months after the new collective bargaining agreement became effective. This may be right or wrong--if our review were plenary, I would join my colleagues in holding that it is wrong--but it does not transgress the integration clause. It is an effort to interpret the contract by reference to post-signing conduct, and a collective bargaining agreement may be altered by the post-signing acts of the party sought to be bound. *See Transportation-Communication Employees v. Union Pacific R.R.*, 385 U.S. 157, 160-61, 17 L. Ed. 2d 264, 87 S. Ct. 369 (1966); *see also International Business Lists, Inc. v. American Telephone & Telegraph Co.*, 147 F.3d 636, 641 (7th Cir. 1998); *Matuszak v. Torrington Co.*, 927 F.2d 320, 324 (7th Cir. 1991). Judge Coffey denies the applicability of this principle on the ground that an integration clause (which negates the significance of pre-signing words and conduct) makes post-signing modification by conduct impossible. This reads into the clause more than it contains. But if, as Judge Coffey believes, matters turn on the meaning of the particular text in this zipper clause, that is itself a subject for the arbitrator, and a court's disagreement with an arbitrator's understanding of contractual language does not justify displacement of the arbitrator's decision.

To see the difference between misinterpreting clear language and ignoring it, consider a clear federal statute-- 42 U.S.C. § 1997e(a), the exhaustion requirement in the Prison Litigation Reform Act . This law provides that "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Some courts of appeals concluded that, even if some administrative remedies are "available," exhaustion is unnecessary unless these are the same remedies the prisoner seeks in court. *Booth v. Churner*, 149 L. Ed. 2d 958, 121 S. Ct. 1819 (2001), holds that this is not what the statute means: exhaustion always is required. Should the Supreme Court have said that the courts of appeals that had come to a different conclusion "ignored" § 1997e(a) or "dispensed their own brand of prison justice"? What it actually said is that those courts *misinterpreted* § 1997e(a). It is clear and comprehensive (just like the zipper clause in this collective bargaining agreement), but texts that seem clear to some readers may be understood differently by others. This difference need not imply that one side has ignored the text or decided on grounds extrinsic to it. Arbitrator Berman did not ignore or refuse to follow the integration clause; he discussed it and explained why, in his view, it does not have the effect that Anheuser-Busch and my colleagues attribute to it.

Nor does the award offend the clause forbidding the arbitrator to modify the contract. The arbitrator concluded that Anheuser-Busch had itself modified the deal, and nothing in this collective bargaining agreement forbids post-signing changes by the employer that benefit the employees. It would not be sound to read a no-arbitral-*modification* clause as if it

were a no-arbitral-*error* clause (on the ground that if the arbitrator errs then he has effectively modified the contract); that would imply that courts intervene to correct all blunders. Likewise with the question whether an arbitrator has "exceeded his authority." A court exceeds its *authority* when it acts without jurisdiction; so too with an arbitrator. But if the dispute is arbitrable, then the adjudicator acts "within his authority" even if the decision is bad on the merits. To say otherwise is to turn every interpretive error into a decision "in excess of authority" (because no arbitrator is "authorized to err") and so to make every error (perhaps every "plain" error) a ground for refusing to enforce the award. The parties concede that the dispute at hand was arbitrable. Thus one cannot say that arbitrator Berman "exceeded his authority" because he may have misunderstood or misapplied an integration clause that we judges find clear. The Justices themselves sometimes infer exceptions to the seemingly clear and sweeping language of statutes. *E.g., INS v. St. Cyr*, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001). Even when a forceful dissent remarks on the lack of a textual basis for the maneuver (as in *St. Cyr*) the majority does not concede that it has either exceeded lawful authority or failed to interpret at all.

Judge Rovner and I agree that post-signing conduct by an employer may in principle create legal obligations as an alteration of the agreement. We agree, moreover, that arbitrator Berman acted in good faith and did not attempt to smuggle into the award preconceptions about labor's entitlements. He did not, for example, implement personal notions about the appropriate relative wages for one-driver and two-driver delivery systems. Likewise we agree that because the employer's post-signing conduct is identical to its

pre-signing conduct, it is very hard to disentangle the two--and that there is a corresponding temptation to enforce the pre-signing conduct in the name of post-signing acts. The arbitrator's reference to "fairness" permits an inference that he took that forbidden step, and both of my colleagues fault him on this ground. Avoiding the "f" word in both contemplation and exposition promotes clear thought and accurate decision. Yet it cannot be that every opinion referring to "fairness" shows that the law and the parties' dealings have been put to one side. If that were so, a goodly number of our own opinions would be suspect. Many a reference to "fairness" is just a code word for a genuine interpretive principle. The misleadingly named doctrine of "good faith and fair dealing" in contract law is an example. *See L.A.P.D., Inc. v. General Electric Corp.*, 132 F.3d 402 (7th Cir. 1997).

Having come this far together, Judge Rovner and I part company. She concludes that the arbitrator did not rely on Anheuser-Busch's post-agreement conduct. By this she means that the arbitrator did not implement post-signing conduct "in and of itself" (slip op. 22)--that is, taken in isolation from the pre-signing conduct. She also believes that the arbitrator was swayed at least in part by a desire to achieve a more fair outcome. I accept these as factual propositions but do not think they have legal consequences. How could an arbitrator sharply differentiate pre- from post-signing conduct? One was a continuation of the other. It is not sufficient to annul an award that an arbitrator might have acquiesced in a temptation to enforce pre-contractual conduct in the name of fair play. Even judges often say that they reach one result over another in interpreting a contract because they think the result better on grounds of policy (a more concrete

substitute for "fairness"). By ruling that considerations of this kind spoil an award my colleagues yield to a temptation of our own profession--to equate an interpretive error with failure to interpret the contract at all.

"The question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract." *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987). Arbitrator Berman performed an interpretive task--one complicated by the rule that post-signing conduct can become a contractual obligation, and by the fact that the post-signing conduct continued a practice that predated the latest collective bargaining agreement, but an interpretive exercise nonetheless. Parties who want to preclude courts or arbitrators from treating their course of performance as altering the bargain have only to provide that deals may not be modified by conduct (or, more broadly, in any way other than writing). No such clause appears in this collective bargaining agreement. Let me harp on a vital point: to the extent that the real dispute is about the meaning and effect of the zipper clause, that is itself a matter of contractual interpretation on which the arbitrator's view is conclusive. The conclusions on which Judge Rovner and I agree--that the arbitrator was not "acting in bad faith, [and that he did not] purposely set about to dispense his own brand of industrial justice" (slip op. 23)--should lead straight to an order enforcing the award, for if he was not ladling out "his own brand of industrial justice" then he must have been implementing the parties' bargain as he understood it, rather

than acting on extra-contractual grounds.

Last May the Supreme Court reiterated the principles that govern the enforcement of arbitral awards:

> Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987). We recently reiterated that if an "'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62, 148 L. Ed. 2d 354, 121 S. Ct. 462 (2000) (quoting *Misco, supra,* at 38). It is only when the arbitrator strays from interpretation and application of the agreement and effectively "dispenses his own brand of industrial justice" that his decision may be unenforceable. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960). When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's "improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award. *Misco*, 484 U.S. at 39.

Major League Baseball Players Ass'n v. Garvey, 149 L. Ed. 2d 740, 532 U.S. 504, 121 S. Ct. 1724, 1728 (2001). I am willing to concede for the sake of argument that arbitrator Berman made a whopper of an error, the sort of thing that the Supreme Court called an "improvident, even silly" conclusion. Nonetheless, given the law laid down in *Garvey* and its predecessors, the award must be enforced--for the parties delegated interpretation to an arbitrator, not a court. To equate error with non-interpretation is to vitiate the doctrine that awards must be enforced even if they reflect factual, interpretive, or legal blunders, *see George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001), and to deprive the parties of what they bargained for when they chose arbitration: swift, inexpensive, and final decision. Arbitration can be neither swift nor inexpensive if it is not also conclusive; otherwise parties are just adding one layer to those that courts provide already.

A true Copy:
Teste: s/s_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 00 C I424

[Filed November 22, 2000]

ANHEUSER-BUSCH, INC.,
Plaintiff/Counter-Defendant,

v.

BEER, SOFT DRINK, WATER, FRUIT JUICE, CARBONIC GAS, LIQUOR SALES DRIVERS, HELPERS, INSIDE WORKERS, BOTTLERS, WAREHOUSEMEN, SCHOOL, SIGHTSEEING, CHARTER BUS DRIVERS, GENERAL PROMOTIONS EMPLOYEES, AND EMPLOYEES OF AFFILIATED INDUSTRIES, MALTSTER, LABORERS, SYRUP, YEAST, FOOD, VINEGAR, BREWERY, RECYCLING, AND MISCELLANEOUS WORKERS OF CHICAGO AND VICINITY, ILLINOIS, LOCAL UNION NO. 744, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Defendant/Counter-Plaintiff.

Judge: James B. Zagel

MEMORANDUM OPINION AND ORDER

Anheuser-Busch (ABI) moves for summary judgment and asks me to vacate an arbitrator's award. 29 U.S.C. § 185. Arbitrator Berman sustained the grievance of the defendant, Local 744, finding that ABI violated its contract with the Union after the parties modified or amended the collective bargaining agreement by their post-execution conduct. ABI maintains that the plain language of the CBA compels the opposite result and argues that the arbitrator overstepped his authority when he sustained the grievance. Not surprisingly, the Union believes the arbitrator reached the correct result and moves for summary judgment on its counterclaim requesting enforcement of the arbitration award. The parties agree that there are no material facts in dispute and summary judgment (one way or the other) is appropriate.[1] *See* Fed. R. Civ. P. 56(c).

ABI operates a beer distributorship in Arlington Heights, Illinois. This case is about commission rates paid to driver salesmen who delivered pre-sold ABI products to "off-premise" accounts, such as liquor stores and supermarkets. The contract sets different commission rates for drivers who work one-person routes and for those who work two-person routes (where the driver is accompanied by a helper). The rate

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[1] Of course, just because the parties file cross-motions for summary judgment, it does not mean that judgment must be entered for one party or the other. However, in this case, it is clear that there are no disputed facts. Then only issue is the legal question of whether, in light of the required deferential review, the arbitrator acted within the scope of his authority or not.

for two-person routes is lower than the rate for one-person routes. This two-tiered commission structure was part of the parties' CBA in 1990, 1994 and I998 (the CBA at issue in this case). Prior to 1998, ABI did not pay the two-person route commission, even though it was an express term of the contracts; it paid all drivers the higher one-person route rate. Two months after the 1998 CBA became effective, ABI decided to follow the terms of the contract and pay the two-person rate whenever a helper accompanied a driver salesman.[2] The Union filed a grievance claiming that the practice of paying only the one-person rate trumped the written terms of the CBA, the arbitrator sustained the grievance, and ABI sued to vacate the award.

My review of an arbitrator's award is a narrow one. In the parlance of the Supreme Court, an arbitrator's "award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361 (1960). Put another way, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he has committed serious error does not suffice to overturn his decision." *United Paperworkers*

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[2] ABI says it did this as part of a restructuring designed to address concerns over customer service and rising sales volumes. The Union does not deny that this was ABI's motivation.

International Union v. Misco, Inc., 484 U.S. 29, 38, 108 S.Ct. 364, 371 (1987). The question then is this: was the arbitrator interpreting the contract? If yes, I must uphold the award; if no, I will vacate the award. If there is any doubt, I must resolve it in favor of upholding the award. *Ethyl Corporation v. United Steel Workers of America,* 768 F.2d 180, 187 (7th Cir. 1985).

The CBA contains an integration clause, a"zipper" clause, which states (at Article 20 § 20): "This agreement constitutes the full and complete agreement between the parties and supersedes all prior agreements between the parties or their representatives, oral or written, including all practices not specifically preserved by the express provisions of this Agreement." From 1990 to 1998, ABI engaged in a practice of paying drivers the one-person route commission. This practice was not specifically preserved by the CBA, indeed it is completely inconsistent with the express terms of the contract (*i.e.*, two commission rates). The arbitrator thus claimed to ignore the past practice of ABI; he interpreted the zipper clause to preclude modification of the terms by reference to past practices. This much is clear from his statement, "the zipper clause invalidates prior agreements and prior practices not incorporated into the written contract." February 11, 2000 Opinion and Award at p. 22. There can be no question that the arbitrator interpreted the contract, the zipper clause, in reaching that finding.

However, the arbitrator found significance in the fact that the practice of paying only the one-person rate continued after the execution of the 1998 CBA. At that point, the practice was no longer a past practice, but a post-practice.

The arbitrator interpreted the zipper clause to invalidate only past practices, and stated "neither the contract clause nor the [parol evidence role] prohibits parties to a collective bargaining agreement from amending or adding to the agreement *after* it has been negotiated and executed." Opinion and Award at p. 22 (emphasis in original). The arbitrator said ABI, by continuing to pay the one-person rate, "did just that." *Id.* Therefore, the arbitrator found that the CBA had been modified by the parties by virtue of their post-execution conduct and that ABI violated this modified agreement by changing its practice to conform to the written contract.

ABI says this is sophistry -- the arbitrator paid lip service to the zipper clause, but essentially gutted it. ABI notes that the arbitrator criticized its maneuvers as unfair, and went out of his way to chastise the Company for failure to offer the Union an opportunity to bargain about the one-person rote. These comments are not about interpreting the contract, says ABI, but about imposing a personal brand of industrial justice on the parties. Moreover, even if there were no zipper clause, the arbitrator exceeded his authority by elevating a practice ("the law of the shop") to a contractual term.

The Union says the arbitrator carefully interpreted the CBA, as demonstrated by his decision to bar nine years of past practice as invalid given the zipper clause, and then simply applied traditional contract principles to find that the parties modified the 1998 CBA when they continued with the one-person rate.

An arbitrator may not use the law of the shop to

modify clear and unambiguous provisions of a CBA. *Chicago Web Printing Pressmen's Union, No. 7 v. Chicago Newspaper Publishers' Association,* 772 F.2d 384, 387-388 (7th Cir. 1985); *Tootsie Roll Industries, Inc. v. Local Union No. 1, Bakery, Confectionery and Tobacco Workers' International Union,* 832 F.2d 81, 84 (7th Cir. 1987); *Judsen Rubber Works, Inc. v. Manufacturing, Production & Service Workers Union Local No. 24,* 889 F.Supp. 1057, 1064 (N.D. Ill. 1995). In this case, the law of the shop, one rate only, directly conflicts with the CBA. There is much force to ABI's argument that the arbitrator used the law of the shop to amend the contract, not interpret it. Here, the contract says two rates. There is no ambiguity, yet the arbitrator looked to the ongoing practices to nullify the two-person provision and excise it entirely.

In the arbitrator's words, "although I cannot 'add to, subtract from, modify or change in any way the terms of this Agreement,' I am not precluded from giving effect to a long-standing practice or oral understanding reaffirmed and readopted by the Company following execution of the Agreement." Opinion and Award at p. 23 (quoting Article 4 § 1 of CBA). By giving effect to the practice, the arbitrator admittedly went outside the written contract. In his view, however,' the written contract did not represent the parties' entire agreement because they modified it through a course of conduct. ABI characterizes this as re-writing the contract, while the Union says this is a matter of interpreting the entire agreement.

There is a difference between inferring an implied term in a contract and creating one. *Ethyl Corp.,* 768 F.2d at

186. Inferring terms is contract interpretation, and may be done even if the contract is not ambiguous; moreover, the arbitrator is not obliged to read the contract literally. *Id.* Arguably, the arbitrator interpreted the zipper clause when he decided that it did not preclude post-execution practices. Making "noises of contract interpretation" cannot shield an arbitrator from judicial correction. *Id* .at 187. Here, the arbitrator not only made noises of contract interpretation, but also made noises of fairness, invoked extra-contractual principles of labor law, and seemed persuaded by the same "long-standing" past practice that he found invalid under the terms of the CBA.

In the end, however, I am persuaded that the narrow confines of judicial review -- the policy discouraging judicial interference in agreed-upon arbitration proceedings -- warrants upholding the arbitrator's award. Arbitrator Berman may have erred in interpreting the zipper clause, and in finding that the parties modified the contract, but these decisions are arguably matters of contractual interpretation. Reasonable minds may differ in their characterization of the arbitrator's decision--either he inappropriately elevated the law of the shop or he interpreted the parties' agreement to include both the written CBA and a separate oral agreement. That is enough, barely, to sustain the award.

I do not believe Arbitrator Berman exceeded the scope of the question presented to him. The parties framed the issue as: "did the Company violate the labor agreement by changing its practice to conform to the contract provisions relating to two-person route commission rates?" The arbitrator found that the labor agreement included a separate oral agreement that

differed from the written contract provisions, and that it was this "meta" labor agreement that ABI violated. This falls within the framework of the question presented.

I am not moved by the inconsistencies that result from the arbitrator's decision. The fact that the award now puts ABI at a competitive disadvantage compared to other employers, in conflict with Article 20 § 14, was apparently considered by the arbitrator (Opinion and Award at p. 15) and he was not persuaded. I cannot say that this means he was not interpreting the contract. Again, at most, it means he was mistaken in his interpretation.

The arbitrator's award shall be enforced. The Union has not demonstrated, by reference to specific facts, that prejudgment interest is necessary to prevent ABI from receiving an inappropriate windfall, and therefore I exercise my discretion to deny the Union's request. See *Chrysler Motors Corporation v. International Union, Allied Industrial Workers of America, AFL-CIO,* 959 F.2d 685, 689 (7th Cir. 1992).

CONCLUSION

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. I deny the request for prejudgment interest. The Clerk shall enter judgment in favor of the defendant, terminating the case.

ENTER:

/s/_____
James B. Zagel
United States District Judge

DATE: 11/20/00

APPENDIX D

Arbitration Federal Mediation and Conciliation Service

FMCS No. 98-14767-A
Arbitrator's File 99-117
Grievance No. 06017

[Filed February 11, 2000]

Anheuser-Busch, Inc.,	)
	)
Company,	)
	)
and	)
	)
International Brotherhood of Teamsters, Local Union No. 744,	)
	)
Union.	)
	)

Issue: Driver Commissions on Two-Person Routes

Herbert M. Berman, Arbitrator

Margaret Angelucci, Asher, Gittler, Greenfield & D'Alba, Ltd., Attorney for Union

Arbitration Federal Mediation and Conciliation Service - 2/11/00

Ronald W. Weiss,
Attorney for Company

OPINION AND AWARD

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Arbitration Federal Mediation and Conciliation Service - 2/11/00

Opinion and Award

I. Issue

The parties stipulated to the issue: Did the Company violate the labor agreement by changing its practice to conform to the contract provisions relating to two-person route commission rates? If so, what is the appropriate remedy? (Hearing Transcript, at 5-6).[1]

II. Statement of the Case and Background

The Chicago Beer Wholesalers Association "is a multi-employer organization which negotiates and enters into contracts on behalf of its members. Anheuser-Busch...negotiates jointly with the Association" and "has adopted the identical language of the contracts negotiated by the Association and also signs its own contract" (Tr. 6).[2]

The Association, the Company and the Union entered into a contract for a term beginning May 1, 1986 and ending April 30, 1989 (Tr. 6). That contract provided that "Package

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[1] In the remainder of this Opinion, I shall cite non-testimonial portions of the hearing transcript as "Tr.__." I shall cite testimony by surname and page reference, for example, "Hamilton 25." I shall cite Joint Exhibits as "JX __" and Company Exhibits as "CX ___." There were no Union exhibits.

[2] No collective bargaining agreement executed separately by Anheuser- Busch and Local 744 was offered into evidence. The parties produced three agreements executed by the Chicago Beer Wholesalers Association and Local 744 (JXs 2, 3 and 4).

Driver Salesmen [would receive] the same rate of pay and commission regardless of whether…they had Helpers or any other employee assisting them in the performance of their duties" (Tr. 6-7). The next contract, the 8/17/90-1/31/94 contract (JX 3), "provided a lower commission to Package Driver Salesmen who had a Helper or Assistant Driver Salesman," which is known as the "two-person rate" (Tr. 7). The two-person rate was carried over into the 5/1/94-1/31/98 contract (JX 4) and the 2/1/98-1/31/03 contract (JX 2) (Tr. 7).

Starting in early 1990 and continuing for "approximately nine years and through the life of two separate contracts and a portion of the term of the current contract until approximately late April 1998," the "Company continued compensating Package Driver Salesmen at the same rate regardless of whether…Helpers or Assistant Driver Salesmen accompan[ied] them on their routes" (Tr. 7-8). When the Company discontinued this practice the Union filed a grievance on May 7, 1998 (JX 1):

> In contract years 1989 and 1994 as well as the first two months of the 1998 contract the Employer has paid the full one-person route commission when a Helper or Assistant was placed on a route. Now the Employer has stopped this practice. We do not believe this is fair or proper to withdraw from this practice of the past nine years and two months and want this practice reinstated and these Driver Salesmen paid their lost commissions.

The parties did not resolve the grievance. I conducted a hearing in Elk Grove Village, Illinois on July 23, 1999. Both parties have filed post-hearing briefs.

III. Relevant Provisions of the Agreement

Article 4 -- Grievance Procedure

Section 1: Step 3

*** The jurisdiction of the arbitrator shall be only in regard to the particular dispute before him and he shall have no power or authority to add to, subtract from, modify or change in any way the terms of this Agreement .... The fees and expenses of the arbitrator, including the cost of any transcript of the proceedings and the cost, if any, of the hearing room, shall be shared equally between the Employer and the Union. ***

Article 5 -- Management Rights

The Employer reserves all traditional management rights except to the extent that such rights may be modified or restricted by the specific terms of this Agreement. The management of the business and the direction of the work force, including but not limited to the right to plan, direct and control all operations or services to be performed by employees, to schedule working hours, to hire, promote, demote and transfer, to suspend, discipline or discharge for just cause, to relieve employees because of lack of work or for other legitimate reasons, to make, publish, and enforce reasonable rules and regulations, to introduce new or

improved methods, materials, products or facilities are the exclusive function of management limited only by the express language of this Agreement; provided, however, that such rights shall not be exercised in a manner contrary to or inconsistent with the terms of this Agreement or existing law. Any claim that the Employer, in the exercise of its traditional management rights, is violating the provisions of this Agreement may be taken up through the grievance procedure including arbitration.

Article 12 -- Wages

The Commissions and wage rates to be payable during the term of this Agreement shall be as follows:

Section 1. Package Driver Salesman

(a) One-Person Routes. A Package Driver Salesman who has no Assistant Driver Salesman assigned to the route serviced by him shall be paid the following commissions for each case of merchandise sold or delivered during the term of this Agreement to stops on the route serviced by him:

	2/1/98	2/1/99	2/1/00	2/1/01	2/1/02
Route-sell stops	38¢	39¢	40¢	41¢	42¢
Pre-sell stops	30¢	31¢	32¢	33¢	34¢

Any Package Driver Salesman covered by this paragraph (a) who is directed to deliver draft beer to a stop will be paid a commission of $1.25 per half barrel delivered.

(b) Two-Person Routes. A Package Driver Salesman who has an Assistant Driver Salesman (or any other employee assigned as a Helper) assigned to the route serviced by him shall be paid the following commissions during the term of this Agreement for each case of merchandise sold or delivered to stops on the route serviced by him:

	2/1/98	2/1/99	2/1/00	2/1/01	2/1/02
Route-sell stops	38¢	39¢	40¢	41¢	42¢
Pre-sell stops	30¢	31¢	32¢	33¢	34¢

Any such Package Driver Salesman who is assigned to a route on which the list of accounts had a history of purchasing not more than 125,000 cases during the prior 12-month period shall be paid $100.00 per week of 5 days in addition to the above commission. Any Package Driver Salesman covered by this paragraph (b) who is directed to deliver draft beer to a stop will be paid a commission of 90¢ per half barrel delivered.

Article 13 -- Job Classification Duties

Section 1. Package Driver Salesmen, Assistants and Helpers

Package Driver Salesmen, Assistant Driver Salesmen, Helpers,(employees, other than Assistant Driver Salesmen, who are assigned to assist Package Driver Salesmen in the absence of an Assistant Driver Salesman or for any other reason) and Relief Driver Salesmen shall attend to their regular duties....

Arbitration Federal Mediation and Conciliation Service - 2/11/00

Article 14 -- Change of Route Structure and Manning

Section 2. Manning

Whether a given package beer route or draft beer route shall have an Assistant Driver Salesman or Helper assigned to it shall be left to the discretion of the Employer. Employees classified as Assistant Driver Salesman shall have a regular route assignment which may be changed by the Employer to meet business requirements.

Article 20 -- Miscellaneous

Section 14. Employer's Interest

The Union agrees to further the interest of the Employer whenever it has the power to do so, but it shall not be required to do any act or thing prohibited by law, and the Union shall apply this Agreement uniformly to each Employer signatory hereto.

Section 20. Entire Agreement

This Agreement constitutes the full and complete agreement between the parties and supersedes all prior agreements between the parties or their representatives, oral or written, including all practices not specifically preserved by the express provisions of this Agreement. This Agreement is the entire agreement between the parties and is the result of extensive negotiations in which both parties had the right and the opportunity to submit proposals and to negotiate their proposals with the other party. Consequently, except as

expressly otherwise provided, neither party is obligated to bargain during the term of this Agreement except to bargain for a new agreement prior to the expiration of this Agreement.

IV. Summary of the Relevant Evidence

A. Background

1. Operations

The Agreement covers the Company's "Arlington Wholesale Operation," from which Anheuser-Busch products are sold and distributed "to roughly...1300 retail accounts" in the northwest suburbs of Chicago (CX 1; Castanheira 62-3). About 66 employees work out of Arlington Heights, including 34 bargaining unit employees (CX 1).

Until 1990, Driver Salesmen were known as "peddle drivers" and had "sole responsibility for both the sales function and the delivery function" (Franek 91-2). In 1990, the Company implemented the "pre-sell system" in which a Driver Salesman assigned to off-premises accounts "would be primarily responsible for the delivery function" instead of both the "sales and delivery function" (Franek 92). The Company reduced the number of routes from thirteen to ten (Franek 92). The Company "continued to pay the...one-person rate... when there [were] two people on the truck (Franek 93, 97).

Sixteen bargaining unit employees (CX 1) deliver beer to "on-premise" accounts (bars and restaurants) and "off-premise" accounts (liquor stores, drug stores and other carry-

out outlets) (Castanheira 63-4). Beer is generally "pre-sold" to off-premise accounts, that is, "an advance sales person... meets with the customer, prepares an order and then communicates that order to [the] warehouse" (Castanheira 63). Then the pre-ordered product "is [loaded] onto the trucks to the specific customer and...delivered by...pre-sell Driver Salesmen" (Castanheira 63-4). A peddle or on-premise Driver Salesman estimates "what he is going to sell that day for his entire route and then goes into the restaurants, bars, hotels, etc." (Castanheira 64). He sells "the product directly to the on-premise...accounts- (Castanheira 65). A peddle driver's commission rate is higher than a pre-sell-driver's commission rate (Castanheira 64). A Helper helps a driver make deliveries, and is "assigned daily" on the basis of the "volume...going out that day" (Castanheira 65).

2. Bargaining History

The 8/17/90-1/31/94 contract and the two successor contracts (JX 2-4) "provided a lower commission to Package Driver Salesmen who had a Helper or Assistant Driver Salesman" (Tr. 7). Until April 1998, however, the Company continued to pay the higher one-person commission to drivers on a two-person route (Tr. 7).

Several Union witnesses testified with respect to promises made by management on drivers' commissions. James Hamilton, a Driver since 1986 or 1987, testified that Driver Salesmen and other bargaining unit employees struck the Company in 1989 (Hamilton 25-6). Hamilton testified that in the course of the strike, then-General Manager Larry Green called Drivers together in the Company conference room; he

told them they "would have the same pay...with a Helper or if [they] worked by [themselves]" (Hamilton 27-8; see also Marks 44). One of the Drivers asked Green "if we were going to lose money or anything," and Green replied, "You wouldn't lose any money,...you would still get the higher rate if you had a Helper or [if] you worked by yourself" (Hamilton 28).[3] The contract was ratified in 1990 and employees returned to work; the two-man route pay rate was not implemented "regardless of whether [Drivers] had a Helper or not" (Hamilton 29-30).

Hamilton also testified about "a meeting prior to the execution" of the 1994-98 contract (JX 4) between management and Drivers (Hamilton 30). Although General Manager Joseph Castanheira met with "all the Drivers" prior to ratification of the 1994-98 contract, he said nothing about "a change to the two-man route pay" (Hamilton 31; Marks 45). During the 1994-98 contract Drivers continued to receive one-man route pay (Hamilton 31-2). In 1998, Hamilton testified, bargaining unit employees initially voted against ratification of the contract (Hamilton 32; Marks 45). After the no-ratification vote, Castanheira, Sales Director Jane Roth and Operations Manager James Franek met with Drivers, but there was no "discussion about implementing the two-man rate" or a "reduction in commissions" (Hamilton 33; Marks

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[3] The Company objected to this "line of questioning" on the ground that Article 20, Section 20 of the Agreement is a "zipper clause which states that this current labor agreement supersedes all prior agreements between the parties..." (Tr. 28-9). I overruled this objection, stating that "one of the ultimate questions is the effect of the zipper clause ...relative to the practice..."(Tr. 29).

46). Castanheira said that "if the contract was voted in...we would probably get a three or four percent raise" (Hamilton 33). On cross-examination, Castanheira testified that he did not say that he "would be applying the two-man route pay" (Castanheira 86). There was no "discussion...concerning implementing the two-man route" (Franek 98). After this meeting, employees ratified the contract (Hamilton 34).

Business Representative Edward Natzke testified that Castanheira and Franek told him in April 1998 that "they were going to implement the language in the contract and that they were going to take a route off the street so that the guys wouldn't suffer a reduction in pay, and we had some discussions about the fact that there was going to be a reduction in pay and an increase in the workload as well" (Natzke 567). When Natzke suggested that Drivers "were going to be doing more work for less money," Castanheira and Franek replied that "they didn't want to hurt the guys, that's why they were going to give them extra work to do" (Natzke 57).

B. Changes in Operations in April 1998

Castanheira testified that the Company had "two primary reasons" for changing delivery operations in April 1998 improving customer service and cutting costs (Castanheira 678). According to Castanheira, off-premises accounts were growing and requiring more beer, "and in a traditional one-man route, tying up that back door and also providing the merchandising and setting up the displays was taking longer and they were requiring more help" (Castanheira 67). Some customers asked the Company to

"speed up some of [its] deliveries," not tie up "back door space," and provide more merchandising help (Castanheira 68). If more Helpers were needed, the Company, Castanheira testified, was "facing a crossroad of do we add more help to that, [or] do we reroute" (Castanheira 67-8).

Castanheira met with Drivers on April 15, 1998 (Castanheira 69). He reviewed with them a document (CX 2) he had prepared outlining the changes to be instituted (Castanheira 69).

Arbitration Federal Mediation and Conciliation Service – 2/11/00

[fold out exhibit for p.10 ROUTING]

This document provides:

ROUTING

SITUATION

- Last rerouted February 1994
  - Created on/off-premise split
  - Route average 159.0M off-premise
    - One-man routes

- Routes have grown to projected 180.0M
  - Increased Helper demand/cost
  - Cannot continue under current system
    - Service side
    - Cost side

- Can no longer pay above contract rate
  - Originally established to low route averages

ARLINGTON W.O.D. ROUTING

OPTION	CONCEPT	SITUATION	+/-
• Maintain Status Quo	• Stay With Current Routes	• Routes Growing Bigger • Increased Two-Man Stops	+ Status Quo - High Cost to Branch
• Maintain Status Quo and Pay at Contract Rate	• Stay With Current Routes	• Same As Above, But Reduction of Driver Wages	+ Status Quo + Cost Savings to Branch - Employee Wage Reduction
• Reroute From 10 to 9 Pre-Sell	• Maintain Off-Premises Routes • Increase Volume/ Accounts Per Route • Blended Commission Rate • Increased Use of Helpers • Positioned for Long Term	• Increases Route Size - Case 10-20M - Accounts — 4 • Routes Will Maintain Blended Commission Rate - Peak - Non-Peak	+ Minimize Employee Wage Variance + Increase Experienced Helpers + Cost Savings to Branch + Positioned for Route Volume Growth +/- Reduction in One Driver Position +/- Employee Satisfaction

Arbitration Federal Mediation and Conciliation Service – 2/11/00

How Will 9 Routes Work?

- Route Assignments
  - -Jim and Joe will assign
  - -Route seniority determines who will lose 10th route

- Helper Assignment
  - -Blended Rate No route will be assigned a permanent Helper
  - -Daily assignments (blended rate)

- Transfer/Relief Driver
  - -Assigned daily as current practice
  - -Wage structure will be paid for the job done that day

Changes were announced on April 17 and implemented on Monday, April 27 (Castanheira 74). Essentially, the Company changed the "pre-sell" or "off-premise" routes. The number of routes was reduced from ten to nine, the number of full-time Helpers was increased from three to five (Castanheira 67, 76; CX 1), and a Driver assisted by a Helper was paid the contractually established two-man rate instead of the one-man rate he had been paid. "Roughly four additional accounts" were added to each pre-sell route, amounting to an additional 10,000 to 20,000 cases sold and delivered (Castanheira 78).

According to Castanheira, the net impact of the changes "when you add all the routes up together was...positive"; currently, pre-sell drivers make "roughly...$48,000 to $55,000 a year and work "approximately 40 hours a week" (Castanheira 76-7). The

evidence did not establish that any Driver's pay was lower after, or reduced as a result of, the change in April 1998. Hamilton testified that his earnings were $44,996 in 1997 and $48,454 in 1998 (Hamilton 36-7). He suggested that he would have "made more money" in 1998 had he been paid the one-man route rate (Hamilton 38).

V. Summary of Arguments

A. The Union

1. The "issue...is whether the long-standing past practice supersedes the contract language" (Un. Brief, 12). Although the contract "prohibits the arbitrator from adding to, subtracting from or modifying" the contract, "a collective bargaining agreement is a living document and a contract and past practice are interwoven in the process of collective bargaining" (Un. Brief, 12). See *Jafco, Inc.*, 82 LA 283, 286 (Armstrong 1984). "Long-standing practices which have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions'' (Un. Brief, 13).

2. Here, "the language of the contract has been amended and superseded by the past practice" (Un. Brief, 14). Consistent with well-established authority,[4] the "lengthy past practice was 'on par with or more persuasive than contrary

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[4] Citing Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works*, 4th ed. (Washington: Bureau of National Affairs, 1985), at 437; *Associated Wholesale Grocers*, 100 LA 508 (Conley 1992); and *County of Hennepin*, 84 LA 593 (Neigh 1985).

contract language'" (Un. Brief, 14, 15). It "affected employees' wages, one of the most important...right[s] of bargaining unit employees" (Un. Brief, 15). It "affected all of the drivers and was a widespread practice" (Un. Brief, 15).

3. The practice "was incentive for employees to ratify contracts from 1989 to the present"; and it "was continually approved and condoned by Anheuser-Busch management from 1989 to April, 1998" (Un. Brief, 15-16).

4. Neither the practice nor a change to the practice was "discussed after its initial implementation in 1989" (Un. Brief, 16). It continued for nine years (Un. Brief, 16).

5. Employees "relied on the pay structure as implemented from 1989 to 1998" (Un. Brief, 16).

6. "This practice was specifically detailed, and was well known among all employees and all levels of management" (Un. Brief, 16).

7. "Arbitrators are more likely to order the continuance of a practice involving employee benefits," such as the one in question, "than one concerned with basic management functions" (Un. Brief, 17). *United States Borax and Chemical Corp.*, 48 LA 641 (Bernstein 1967).

8. Arbitrators "have found that long standing, consistent and continual practices, unopposed by management, become a provision of the agreement" (Un. Brief, 17). *Teledyne Columbia Summerill* Co., 73-1 ARB ¶8161 (Sherman 1973).

9. In "numerous cases arbitrators have found that in the face of a lengthy past practice an employer may not remain silent during contract negotiations during which no changes in the pertinent provisions are made or discussed and thereafter expect to unilaterally discontinue the practice" (Un. Brief, 19). See *Jafco, Inc., supra; Rockwell International,* 71 LA 1055 (Rimer 1978); *Teledyne Columbia Summerill Co.,* supra; *Village* of *Woodridge,* 104 LA 806 (Wolff 1995); *County of Hennepin*, supra n. 3; *Wheeling Pittsburgh Steel Corp.,* 105 LA 298 (Stallworth 1995); and *City of New Haven,* 100 LA 22 (Freedman 1992).

B. The Company

1. "Under the terms of the Labor Agreement, the Union may not defeat the plain language of the agreement by resorting to arguments of past practice and extra-contractual assumptions" (Co. Brief, 5). Article 20, Section 20 of the Agreement "defeats the Union's contention that past practice trumps the language of the Labor Agreement" (Co. Brief, 6). This clause "specifically recognizes that there may be conflicting practices in place, but states that they will not be used to defeat the language of the Labor Agreement" (Co. Brief, 6).

2. The effect of Article 20, Section 20 "is essentially the same as the Parol Evidence Rule which is a substantive rule of contract law which protects the integrity of written agreements by refusing to permit parties to attempt to alter them with evidence of contemporaneous oral declarations" (Co. Brief, 6). See Marlin M. Volz & Edward P. Goggin, eds., *Elkouri & Elkouri: How Arbitration Works,* 5th ed.

(Washington: Bureau of National Affairs, 1997), at 598-99. Article 4, Section 1 of the Agreement bars an arbitrator from modifying the Agreement (Co. Brief, 6). "Together and separately," these clauses and the Parol Evidence Rule preserve "the language of the Labor Agreement as the only intended agreement of the Parties subject to legal enforcement" (Co. Brief, 67).

3. The "broad language" of Article 13, Section 1 of the Agreement "is sufficient to authorize the Company to assign helpers to assist Driver Salesmen 'for any reason.'" When a Helper assists a Driver Salesman, "the two-person commission rate is...appropriate" (Co. Brief, 7).

4. If the grievance is sustained, the "entire Chicago Beer Wholesalers Association" would gain "a substantial competitive advantage over the Company" (Co. Brief, 8).

5. The Union "did not suggest" that it "sought...assurance at actual formal negotiations" that the "one-person rate would be continued despite the language to the contrary in the Labor Agreement" (Co. Brief, 9).

6. The parties "clearly expressed their will that the written Labor Agreement was the only agreement and that it was to be strictly applied and interpreted as written" (Co. Brief, 9).

7. In *United Steelworkers of America v. Enterprise Wheel & Car* Corp., 363 U.S. 593, 597, 34 LA 569 (1960), the United States Supreme Court held that "an arbitrator is confined to interpretation and application of the collective

bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement" (Co. Brief, 10). See also *Leed Architectural Products, Inc. v. United Steelworkers,* 916 F.2d 63 (2nd Cir. 1990); *American Drug Stores, Inc.,* 107 LA 985 (Richman 1996); *Robertshaw Controls* Co., 94 LA 641 (Sergent 1989); *Pike-Delta-York Board of Education,* 95 LA 92 (Dworkin 1990); *Margaret Wagner House,* 94 LA 1252 (Sharpe 1990); *Michigan State University,* 104 LA 516 (McDonald 1995); *Martin Marietta Corporation,* 103 LA 48 (Giralamo 1994); *Chicago Web Printing* Pressmen's *Union No. 7 v. Chicago Newspaper Publishers' Association,* 772 F.2d 384 (7th Cir. 1985); and *E.I. Dupont De Nemours & Co., Inc. & Martinville Nylon Employees' Council Corp.,* 294 NLRB 563 (1989).

8. Evidence of past practice and custom may be introduced "'(1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of ambiguous contract language; or (3) to support allegations that clear language of the written contract has been amended by mutual action or agreement'" (Co. Brief, 10, citing Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works,* 4th ed. (Washington: Bureau of National Affairs, 1985), at 437. The Union "is not seeking to use the evidence of past practice for the first purpose...because the matter is clearly covered" by Article 12, Section l(b) (Co. Brief, 10). The "second purpose...is inapplicable" because Article 12(1)(b) is not ambiguous (Co. Brief, 11). The fact that the Company's practice was

inconsistent with Article 12(1)(b) does not make that language ambiguous (Co. Brief, 11).

9. The Union "is seeking to bind the Company by a practice under circumstances which have changed, i.e., customer service requirements necessitated an increase and eventual doubling of the number of full-time helpers" (Co. Brief, 15). A "past practice which arose in one set of circumstances will not be binding if those circumstances substantially change" (Co. Brief, 15, citing *Goodyear Tire & Rubber,* 107 LA 193 (Sergent 1996)). See also *City of North Olmsted,* 106 LA 865 (Miller 1996).

10.A "past practice in contradiction to the contract provisions" is "gratuitous" and not binding (Co. Brief, 17, citing *Peabody Coal Company, 99* LA 390 (Feldman 1992)).

VI. Discussion and Findings

A. Controlling Principles

Evidence of a mutually established past practice may (1) clarify ambiguous or otherwise unclear contract language; (2) establish a term or condition of employment not provided for in the written contract; or (3) amend the written contract. Here, as the Union points out, I must decide whether a "long-standing past practice supersedes the contract language" (Un. Brief, 12). In other words, did the practice of paying the one-person rate to a driver on a two-person route amend Article 12(1) (a) and (b) of the Agreement?

In *Pike-Delta-York Board of Education,* 95 LA 92, 96 (Dworkin 1990), a case representative of those cited by the Company, arbitrator Harry Dworkin held that an inconsistent and unconvincing past practice will not prevail over "clear and unambiguous contract language." It is equally well-settled that a contract may be modified by a "definite, certain, and intentional" "later agreement...deduced from [the parties'] course of conduct."[5]

Critical awards cited by the Union may be distinguished from the instant case on two grounds: (1) the practice under consideration in each award was not inconsistent with the written contract; and (2) the cited awards did not indicate that the contract under review contained a "zipper" or "entire agreement" clause similar to Article 20, Section 20 of this Agreement.

1.The Validity of a Practice Inconsistent with the Written Agreement: The Parol Evidence Rule

The parol evidence rule provides:

> [I]n the absence of fraud, duress, or mutual mistake, a final written expression of the complete agreement may not be contradicted by evidence of prior or contemporaneous oral

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[5] Marlin M. Volz & Edward P. Goggin, eds., *Elkouri & Elkouri: How Arbitration Works,* 5th ed. (Washington: Bureau of National Affairs, 1997), at 652-53, citing *Gibson Refrigerator* Co., 17 LA 313, 318 (Platt 1951).

> or written understandings and negotiations. It is not a rule of evidence but one of substantive law defining the limits of a contract. When parol evidence is excluded, it is because the evidence is irrelevant.
>
> The parol evidence rule applies when the parties to a written contract intend it to be the final and complete integration of all the terms of that contract. Whether an agreement is an integrated agreement is a question of fact to be determined in accordance with all relevant evidence. The parol evidence rule does not preclude parol evidence from being used to prove the existence of a contemporaneous contract that does not cover the same ground as the integrated writing or an agreement that might reasonably be expected to be embodied in a separate contract. The rule applies only to evidence that, given weight, would alter, vary, or [19] contradict the terms of the written contract.[6] (Footnotes and citations omitted.)

The testimony of drivers Hamilton and Marks that in the course of the 1989 contract negotiations then-General Manager Green said that Drivers "would have the same pay...with a Helper or if [they] worked by [themselves]"

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[6] Tim Bornstein, Ann Gosline & Marc Greenbaum, eds., *Labor and Employment Arbitration,* (New York: Matthew Bender, 1997), Jay E. Grenig, "Contract Interpretation and Respect for Prior Proceedings," Vol. I, Ch.9, S9.0312][a].

(*supra* at 7) is almost-classic parol evidence. Green's assurance obviously given in the hope of settling a strike that the Company would continue to disregard the terms of Article 12 pertaining to commissions on two-person routes was honored during the 1990-94 contract. However, had the Company repudiated Green's promise and simply applied the 1990-94 contract as written, the Union would have had no legitimate recourse. An oral promise made before or contemporaneous with execution of a written contract, even if relied upon by the other party when ratifying the contract, is unenforceable. "[A]s a matter of law the writing is the agreement."[7] Thus,

> ...a written contract is presumed to embody the whole agreement of the parties, and terms or obligations that the parties did not include should be deemed to be deliberately excluded. This is part of the philosophy that, to the greatest extent possible, the words that the parties themselves have used should govern, and legal obligations should be limited to contract language.[8]

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[7] Marvin F. Hill, Jr. & Anthony V. Sinicropi, *Evidence in Arbitration*, 2nd ed. (Washington: BNA Books, 1987), 337, citing *In re Gaines' Estate*, 15 Cal.2d 255, 100 P.2d 1055 (Cal. 1940) and *Radioear Corp.*, 61 LA 709, 715 (May 1973).

[8] Hoover Universal, Inc., 77 LA 107, 112 (Lipson 1981).

The *promise* Green made in 1989 in connection with negotiations for the 1990-94 contract did not necessarily carry over into the 1998-2003 contract. However, as I shall point out, the Company did, in fact, carry the practice embodied in Green's promise into the 1998-2003 contract an act having serious consequences contrary to the interests of the Company.

2. The Zipper Clause

Article 20, Section 20 of the Agreement is what is generally referred to as a "zipper clause." It provides in part that the Agreement is "full and complete" and that it "supersedes all prior agreements,...oral or written, including all practices not specifically preserved by the express provisions of this Agreement."[9]

In the most recent edition of Elkouri and Elkouri, the authors discuss the effect of a zipper clause in some detail:

> The status of unwritten practice and custom may be dealt with specifically in the written agreement by the addition of a well-constructed "zipper clause," which may commonly take the form of either an acknowledgment that the written contract

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[9] The fact that a zipper clause may be considered "boilerplate language does not diminish its importance as part of a collective bargaining agreement. Such clauses, for example, play a significant role in various disputes which are submitted to arbitration." *City of Cleveland,* 106 LA 195, 202 (Cohen 1995).

constitutes the parties' entire agreement and is a waiver of the right to bargain about other conditions, or a specific affirmation that management rights are not limited by prior practices. All binding force of customary practices may be eliminated *if* the contract language is quite strong. Thus, even where a bonus practice was the product of negotiations between company and union and had been paid for several years (but where it was not written into the contract) it could be unilaterally discontinued by the employer since the written contract provided:

> This contract represents complete collective bargaining and full agreement by the parties in respect to rates of pay, wages, hours of employment or other conditions of employment which shall prevail during the term hereof and any matters or subjects not herein covered have been satisfactorily adjusted, compromised or waived by the parties for the life of this agreement [footnotes and citations omitted],[10]

The authors go on to point out that "a weaker clause"-- one stating that "'this contract expresses the entire agreement between the parties' "-- eliminated" only those practices that

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[10] Volz & Goggin, *supra* n. 5, at 645.

conflicted with the contract's terms .... ,[11]

The zipper clause under review is not a "weaker clause"; it is strong and "well-constructed." If a "weaker clause" eliminates "practices that conflict with the contract's terms,"[12] there would seem to be little doubt that a zipper clause that expressly outlaws "all prior agreements,...oral or written, including all practices not specifically preserved by the express provisions of this Agreement," requires that a practice, even a well established practice, give way to clear, indeed indisputable, contract language.

The zipper clause invalidates prior agreements and prior practices not incorporated into the written contract. However, as I shall point out, neither the zipper clause nor the parol evidence rule bars post-execution amendment or modification of an agreement.

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[11] Ibid., at 646, citing *American Seating* Co., 16 LA 115, 116-17 (Whiting 1951).

[12] Arbitrators have not universally embraced the proposition that the sort of "weaker clause" noted eliminates well-established past practices. Arbitrator Ira Jaffe writes that "[s]ome arbitrators have interpreted contractual zipper or integration clauses so as not to eliminate past practices (used as an interpretive tool or as an independent obligation) unless the zipper clause expressly mentions the term 'past practice.'" Bornstein, et al., *supra* n. 6, Ira Jaffe, "Past Practice, Maintenance of Benefits, and Zipper Clauses," Vol. I, Chap. 10, §10.03[5].

3. Effect of the Adoption of the Practice During the Term of the 1998-2003 Agreement

Had the practice under review not been carried over into the term of the 1998-2003 Agreement, the zipper clause, as well as the parol evidence rule, would undoubtedly have invalidated it. However, as the Union notes, the Company carried this well-established, long-standing practice into the first two months of the 1998-2003 Agreement. By carrying this practice over into the term of the new agreement, the Company acknowledged it and reaffirmed it. The practice was clear. Its impact on employees was significant. Most significantly, once reaffirmed after execution of the 1998-2003 Agreement, the practice was no longer a "prior agreement" or "practice" invalidated by either the Zipper Clause or the parol evidence rule. Neither the contract clause nor the evidentiary rule prohibits parties to a collective bargaining agreement from amending or adding to the agreement *after* it has been negotiated and executed. By reaffirming the practice under review, the Company did just that: It readopted a practice, essentially an oral agreement, in effect for years prior to execution of the new contract. [13] Had the Company intended to repudiate the practice, it could and

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[13] Had the evidence established that the Company was involved in multi-employer bargaining as a member of, or in concert with, the Chicago Beer Wholesalers Association, it is problematic whether the Company and the Union would have had the authority to amend the 1998-2003 multi-employer agreement. However, the parties stipulated that Anheuser-Busch had adopted the language of the Association contracts but "signs its own contract" (Tr. 6).

should have done so before continuing it for a period of months into the term of the new agreement.[14] As arbitrator Edgar Jones has written:

> The repeated execution of collective bargaining agreements which contain exclusive agreement provisions canceling "all previous agreements" has no magical dissolving effect upon practices or customs which are continued in fact unabated and which span successive contract periods.[15]

B. Conclusion

Although I cannot "add to, subtract from, modify or change in any way the terms of this Agreement," I am not precluded from giving effect to a long-standing practice or oral understanding reaffirmed and readopted by the Company following execution of the Agreement. While I am sympathetic to the Company's business needs and competitive

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[14] Obviously, the practice in question met the test of "mutuality" articulated by arbitrator Jules Justin in the watershed case of *Celanese Corp. of America,* 24 LA 168, 172 (1954). The practice in question was "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties."

[15] *Fruehauf Traler* Co., 29 LA 372, 375 (1957), cited by Ira F. Jaffe, "Past Practice, Maintenance of Benefits, and Zipper Clauses," Bornstein, et al., *supra* n. 6, Vol. I, Chap. 10, §10.0315].

exigencies, I cannot excuse the Company's failure to offer the Union an opportunity during negotiations to bargain about the one-person rate on two-person routes. [16] I have no choice but to hold the Company to the understandings and promises it ratified and reaffirmed *after* execution of the new contract.

The timing of the change was critical. By waiting for more than two months after the effective date of the new contract to change the long-standing practice on driver commissions, the Company has deprived the Union of its right to bargain on this significant matter for almost five years-- a fundamentally unfair maneuver inconsistent with well-settled principles of collective bargaining.

Award

The grievance is sustained. The Company violated the labor agreement by changing its practice to conform to the contract provisions relating to two-person route commission rates. The Company shall cease and desist from unilaterally declining to pay "package driver salesmen" on "two person routes" the driver commission and wage rates prescribed for one-person routes by Article 12, Section 1(a) of the Agreement. The Company is directed to make whole all employees who lost wages and commissions as a result of its modification of the practice in question.

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[16] I need not and shall not determine whether the Zipper Clause would have permitted the Company to apply the terms of Article 12(1)(b) on the first day of the 1998-2003 contract.

In accordance with Article 4, Section 1, Step 3 of the Agreement, my fees and expenses shall be shared equally between the Employer and the Union.

For the purpose of reopening the record or, if necessary, convening a supplemental hearing to resolve any dispute regarding application of the remedy, I shall retain jurisdiction herein for 60 days or until April 11, 2000. Either party may invoke my jurisdiction by notice mailed or faxed to me at 847/945-2382, with a copy simultaneously mailed or faxed to the other party, on or before April 11, 2000.

/s/_____
Herbert M. Berman
Arbitrator

February 11, 2000